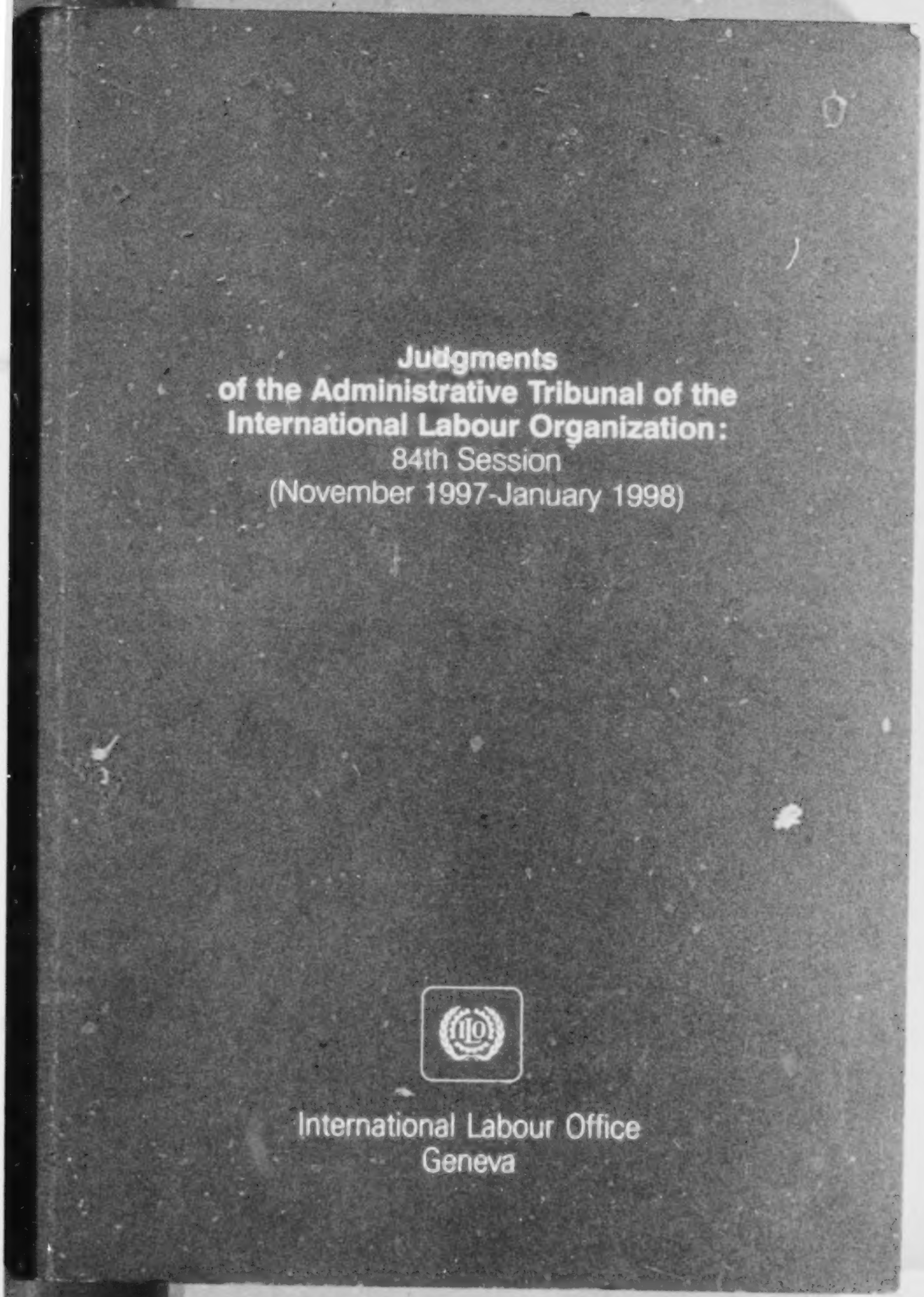

Judgments of the Administrative Tribunal of the International Labour Organization:

84th Session
(November 1997-January 1998)

International Labour Office
Geneva

Judgments of the Administrative Tribunal of the International Labour Organization:

84th Session
(November 1997-January 1998)

International Labour Office
Geneva

ISSN 0378-7362

First published in 1998

Annual subscription: 70 Swiss francs

CONTENTS

1673 Cabral v. UNESCO No. 2
1674 Gosselin v. EPO
1675 Nivelle v. Eurocontrol
1676 Rossi v. ILO
1677 Avia Aranda v. ITU
1678 Fabiani v. ITU No. 3
1679 Serlooten v. ITU
1680 Byng-Clarke, Gomes and Wijayadasa v. UNESCO
1681 Aboo-Baker v. WHO No. 2
1682 Argos, Flösser, Glöckner, Hentze and Olivo v. EMBL
1683 Salahuddin v. FAO
1684 Forté v. EPO
1685 Boland v. Eurocontrol No. 10
1686 Molloy v. Eurocontrol No. 4
1687 Bedrikow v. ILO No. 2
1688 Moran v. EPO
1689 Montenez v. Eurocontrol No. 2
1690 Burri v. UPU
1691 Steele v. ILO No. 3
1692 Steele v. WHO No. 2
1693 Leprince v. UNESCO No. 4
1694 Benaïssa v. UNESCO
1695 Schwaller v. Eurocontrol
1696 Felkai v. CCC
1697 Malhotra (R.K.) v. WHO Nos. 3 et 4
1698 Mitastein v. PAHO No. 3
1699 Halloway v. UNIDO
1700 Masens v. UNIDO
1701 Wassef v. FAO No. 25
1702 Wassef v. FAO No. 26
1703 Broere-Moore v. UNIDO No. 2
1704 Broere-Moore v. UNIDO No. 3
1705 Broere-Moore v. UNIDO No. 4
1706 Broere-Moore v. UNIDO No. 5
1707 Broere-Moore v. UNIDO No. 6
1708 Broere-Moore v. UNIDO No. 7
1709 McLean v. EPO No. 4

1710	Pary v. WIPO No. 6
1711	Lebtahi v. WHO No. 2
1712	Aelvoet No. 6 and others v. Eurocontrol
1713	Carretta, Cherubini, Eldon and Pace v. FAO
1714	Geyer v. UNIDO
1715	Geyer v. UNIDO No. 2
1716	Geyer v. UNIDO No. 3
1717	Morelli v. IFAD No. 2 (Applications by the complainant and by the defendant)
1718	Palma v. ESO
1719	Vollering v. EPO No. 12
1720	Calvio, Dargemont, Gamberi and Pantopoulos v. EMBL
1721	Morris v. WHO No. 3
1722	Prvulovic v. WHO
1723	Qureshi v. FAO No. 2
1724	Alamgir v. IFAD
1725	Yousif v. ITU
1726	Mogensen v. ILO
1727	Curina v. WHO
1728	Swaroop v. WHO
1729	Sardo Infirri v. WHO
1730	Wang v. FAO
1731	Mussnig v. WHO No. 2
1732	Stjernswärd v. WHO
1733	Umar v. IAEA
	Duval v. Eurocontrol (withdrawal)
	Kagermeier v. EPO No. 4 (withdrawal)

LIST OF JUDGMENTS IN ALPHABETICAL ORDER

Aboo-Baker v. WHO No. 2: 1681
Aelvoet No. 6 v. Eurocontrol and others: 1712
Alamgir v. IFAD: 1724
Argos v. EMBL: 1682
Avia Aranda v. ITU: 1677
Bedrikow v. ILO No. 2: 1687
Benaïssa v. UNESCO: 1694
Boland v. Eurocontrol No. 10: 1685
Broere-Moore v. UNIDO No. 2: 1703
Broere-Moore v. UNIDO No. 3: 1704
Broere-Moore v. UNIDO No. 4: 1705
Broere-Moore v. UNIDO No. 5: 1706
Broere-Moore v. UNIDO No. 6: 1707
Broere-Moore v. UNIDO No. 7: 1708
Burri v. UPU: 1690
Byng-Clarke v. UNESCO: 1680
Cabral v. UNESCO No. 2: 1673
Calvio v. EMBL: 1720
Carretta v. FAO: 1713
Cherubini v. FAO: 1713
Curina v. WHO: 1727
Dargemont v. EMBL: 1720
Duval v. Eurocontrol (withdrawal)
Eldon v. FAO: 1713
Fabiani v. ITU No. 3: 1678
Felkai v. CCC: 1696
Flösser v. EMBL: 1682
Forté v. EPO: 1684
Gamberi v. EMBL: 1720
Geyer v. UNIDO: 1714
Geyer v. UNIDO No. 2: 1715
Geyer v. UNIDO No. 3: 1716
Glöckner v. EMBL: 1682
Gomes v. UNESCO: 1680
Gosselin v. EPO: 1674
Halloway v. UNIDO: 1699
Hentze v. EMBL: 1682
Kagermeier v. EPO No. 4 (withdrawal)

Lebtahi v. WHO No. 2: 1711
Leprince v. UNESCO No. 4: 1693
Malhotra (R.K.) v. WHO Nos. 3 and 4: 1697
Masens v. UNIDO: 1700
McLean v. EPO No. 4: 1709
Mitastein v. PAHO No. 3: 1698
Mogensen v. ILO: 1726
Molloy v. Eurocontrol No. 4: 1686
Montenez v. Eurocontrol No. 2: 1689
Moran v. EPO: 1688
Morelli v. IFAD No. 2: 1717 (Applications by the complainant and by the defendant)
Morris v. WHO No. 3: 1721
Mussnig v. WHO No. 2: 1731
Nivelle v. Eurocontrol: 1675
Olivo v. EMBL: 1682
Pace v. FAO: 1713
Palma v. ESO: 1718
Pantopoulos v. EMBL: 1720
Pary v. WIPO No. 6: 1710
Prvulovic v. WHO: 1722
Qureshi v. FAO No. 2: 1723
Rossi v. ILO: 1676
Salahuddin v. FAO: 1683
Sardo Infirri v. WHO: 1729
Schwaller v. Eurocontrol: 1695
Serlooten v. ITU: 1679
Steele v. ILO No. 3: 1691
Steele v. WHO No. 2: 1692
Stjernswärd v. WHO: 1732
Swaroop v. WHO: 1728
Umar v. IAEA: 1733
Vollering v. EPO No. 12: 1719
Wang v. FAO: 1730
Wassef v. FAO No. 25: 1701
Wassef v. FAO No. 26: 1702
Wijayadasa v. UNESCO: 1680
Yousif v. ITU: 1725

The Administrative Tribunal of the International Labour Organization (ILO) is competent to hear complaints against:

International Labour Organization, including the International Training Centre
World Health Organization (WHO), including the Pan American Health Organization (PAHO)
International Telecommunication Union (ITU)
United Nations Educational, Scientific and Cultural Organization (UNESCO)
World Meteorological Organization (WMO)
Food and Agriculture Organization of the United Nations (FAO)
European Organization for Nuclear Research (CERN)
General Agreement on Tariffs and Trade (GATT)
International Atomic Energy Agency (IAEA)
World Intellectual Property Organization (WIPO)
European Organization for Safety of Air Navigation (Eurocontrol)
Universal Postal Union (UPU)
European Southern Observatory (ESO)
Intergovernmental Council of Copper-Exporting Countries (CIPEC)
European Free Trade Association (EFTA)
Inter-Parliamentary Union (IPU)
European Molecular Biology Laboratory (EMBL)
World Tourism Organization (WTO)
European Patent Organisation (EPO)
African Training and Research Centre in Administration for Development (CAFRAD)
Intergovernmental Organisation for International Carriage by Rail (OTIF)
International Center for the Registration of Serials (CIEPS)
International Office of Epizootics (OIE)
United Nations Industrial Development Organization (UNIDO)
International Criminal Police Organization (Interpol)
International Fund for Agricultural Development (IFAD)

International Union for the Protection of New Varieties of Plants (UPOV)

Customs Co-operation Council (CCC)

Court of Justice of the European Free Trade Association (EFTA Court)

Surveillance Authority of the European Free Trade Association (ESA)

International Service for National Agricultural Research (ISNAR)

International Organization for Migration (IOM)

International Centre for Genetic Engineering and Biotechnology (ICGEB)

Organization for the Prohibition of Chemical Weapons (OPCW)

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FOURTH SESSION

***In re* Cabral (No. 2)** **Judgment 1673**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Nelson Cabral against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 25 March 1997, UNESCO's reply of 20 May, the complainant's rejoinder of 12 June and the Organization's surrejoinder of 17 July 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of Cape Verde who was born in 1940, joined the staff of UNESCO in 1981 as a programme specialist at grade P.3. He was promoted to grade P.4 as from 1 January 1988, and since 1 April 1994 has held post SHS-298 in the Cooperation for Development Unit. The Bureau of Personnel approved the post description on 3 November 1994 and the complainant signed it on 22 November.

On 21 March 1995 the complainant asked for a "desk audit" of his post on the grounds that when created it had been too lowly graded. The desk audit was done in June and the findings went to the Senior Personnel Advisory Board (SPAB). In its report of 12 December 1995 the Board was unanimous, after hearing the complainant and a representative of the Bureau of Personnel, that his post had been properly graded P.4. In her memorandum to him of 18 December the Director of the Bureau confirmed that grade on the Director-General's behalf. On 16 January 1996 he protested to the Director-General against that decision. Having got no reply within a month he went to the Appeals Board on 29 February. In its report of 27 November 1996 the Board recommended quashing the impugned decision and ordering another desk audit with a hearing of the complainant's supervisors. By a letter of 22 January 1997, the impugned decision, the Director-General rejected his appeal.

B. The complainant has two pleas. One is that the decision to keep his post at grade P.4 showed two procedural flaws. First, having omitted to question his supervisors, the Director of the Bureau of Personnel could have had no clear or objective idea of the nature of his duties. Secondly, the SPAB proceedings were not adversarial: the grading officer who had assessed his post attended the Board's meeting, whereas he himself was told to leave once it had heard him. Furthermore, the SPAB's report was unsubstantiated.

His second plea is that the Administration overlooked essential facts: "sweeping changes" in his unit have greatly increased his responsibilities, and the desk audit overrated one of the seven factors of assessment.

He asks the Tribunal to declare the Director-General's decision of 22 January 1997 unlawful and to award him 15,000 French francs in costs.

C. In its reply the Organization first submits that the complainant provides no evidence of any great change in the structure and functions of his unit between 20 November 1994, when he signed the post description, and 21 March 1995, when he asked for a desk audit. So he had no reason to seek review of the grading.

Secondly, it denies procedural flaws. For one thing, there was no point in hearing his supervisors since the post description was clear and he himself was able to answer all the questions from the grading officer, who was in no doubt about his duties and responsibilities. He asked neither the SPAB nor the Appeals Board to hear his supervisors. For another thing, the Staff Rules allow the grading officer, as representative of the Director of the Bureau of Personnel, and representatives of the Staff Associations, to attend SPAB meetings. But the grading officer did not take part in the ensuing talks. In any event the complainant was given ample opportunity to have his say orally or in writing. His plea that the SPAB failed to substantiate its recommendation is immaterial since the Board, being unanimous, was endorsing the reasoning of the report on the desk audit.

The post evaluation was proper and took account of all the criteria, and in any case the Tribunal has only limited powers of review over decisions of this kind.

D. In his rejoinder the complainant submits that by signing the post description he simply acknowledged that he had seen it. Only after several months on the job did he realise that the post had been underrated. At no time did the SPAB check the grading officer's assessment and hearing his supervisors would not have been pointless.

Contrary to what the Organization says, though they may not vote, the Administration's representatives do take part in the SPAB's deliberations: they answer questions, whereas staff representatives do not. Lastly, the SPAB's unanimity does not make up for its failure to account for the recommendation.

E. In its surrejoinder the Organization presses its pleas. It asserts that by signing the post description the complainant acknowledged having been "informed of the duties and responsibilities attached to the post". It points out that the representative of the Director of the Bureau of Personnel took technical questions from the SPAB in accordance with the Staff Rules but did not "join" in the talks that followed.

CONSIDERATIONS

1. The complainant, a citizen of Cape Verde who was born on 3 May 1940, has been on UNESCO's staff since 25 May 1981. He was on post SHS-031 and held grade P.3. In March 1991 his post was upgraded to P.4 as from 1 July 1987, and he was promoted to that grade as at 1 January 1988. Though his post used to belong to the Social and Human Sciences Sector it – and he – were transferred by a decision of 22 December 1993 to the Bureau for External Relations. But the Director-General decided that he should go back to Social and Human Sciences. He has been there, on post SHS-298, since 1 April 1994 in a unit that used to be called Operations (SHS/OPS) but later became Cooperation for Development (SHS/CFD). The staff of that unit consists of him, his supervisor, who is at grade P.5, and a secretary.

The Bureau of Personnel approved the description of his post on 3 November 1994. A grading officer of the Bureau rated the post according to the standards of the United Nations common system. The range of points required to qualify a post for P.4 is 1670 to 2039; the complainant's post got 1855 points; and the Bureau graded it at P.4. His supervisors had approved the description of it. The complainant received copies of the description, scoring sheet and classification and put his signature to them on 22 November 1994. He failed to challenge them in time.

He later contended that the reason why he had not then appealed to the Appeals Board was that the Bureau had "not yet committed any breach of due process but had erred in assessing the grade according to the grading standards of the International Civil Service Commission".

On 21 March 1995 he asked to have post SHS-298 upgraded to P.5 and applied for a desk audit. The Bureau replied that it saw no call for one in the absence of any significant new facts. On 31 March 1995 the complainant applied for reclassification under Staff Rule 102.2 and the Director-General agreed to a desk audit. The audit was done, by another grading officer, on 7 June 1995. This time the post got 1912.5 points.

The complainant did a rating of his own and came up with a score of 2445, enough to make his post P.5.

As the procedure required, his case then went to the Senior Personnel Advisory Board (SPAB). In its report of 12 December 1995 the Board unanimously recommended keeping the post at P.4. By a decision of 18 December 1995 the Bureau of Personnel did so.

On 16 January 1996 the complainant protested to the Director-General. In a report dated 27 November 1996 the Appeals Board recommended another desk audit, but on 22 January 1997 the Director-General rejected his appeal and upheld the decision.

2. The complainant pleads procedural and substantive flaws:

(1) The Bureau of Personnel failed to speak to his supervisors, whose opinions were crucial.

(2) The SPAB too committed mistakes of procedure in that:

 (a) it failed to consult his supervisors;
 (b) the proceedings were not adversarial; and
 (c) its finding was not substantiated.

(3) On the merits the impugned decision overlooked material facts:

   (a) The duties and responsibilities of his unit had greatly altered. Thus its name changed from "Operations", which denoted mere support to other units in the Sector, to "Cooperation for Development", a unit that was in direct touch with senior civil servants and government departments in member States. So his own duties and responsibilities rose to P.5.

   (b) Undue weight was given to "managerial responsibilities" and "authority to sign official documents", which together make up one of the seven relevant factors of assessment.

UNESCO rejects both his rendering of the facts and his pleas.

3. Any exercise in grading calls for familiarity with the sort of work that is being done and involves value judgments that only someone with proper training and experience can make. In other words grading is at discretion and the Tribunal will interfere only on limited grounds, namely a formal or procedural flaw, a mistake of fact or of law, neglect of some material fact, misuse of authority, a plainly wrong conclusion from the evidence or action taken *ultra vires*. In the absence of one of those defects the Tribunal will not replace the Organization's assessment with its own or order a change in grading: see Judgments 1067 (*in re* Glenn) under 2; 1152 (*in re* Korolevich), also under 2; and 1647 (*in re* Bombo N'Djimbi) under 7.

4. The complainant cites the reasoning in Judgment 1557 (*in re* Sethi) under 3 to show that the Administration should have consulted his supervisors. In that case the Tribunal did find evidence of an obvious oversight in that the complainant's supervisors had not been questioned because both of them had approved his own assessment of his duties and had therefore called for reclassification. But the Tribunal did not make a general ruling that supervisors should get a hearing.

This case is quite different. The complainant's first- and second-level supervisors both endorsed the post description and grading approved in November 1994, some four months before he asked for review. There is no evidence to suggest that any great change occurred in his duties and responsibilities in those four months. Nor is there any suggestion of such change in the explanation he offered in his rejoinder to the Appeals Board as to why he had put off filing an appeal. In any event he did not ask that his supervisors be heard and his unit saw no reason to have anyone speak for it in the internal proceedings. If the complainant had expected support from his supervisors he would no doubt have got them to speak on his behalf. In the circumstances neither the grading officer nor the SPAB was required *proprio motu* to consult his supervisors.

The plea fails.

5. The complainant pleads breach of his own right to a hearing by the SPAB. He says that according to the rules on procedure the staff member and a representative of the Administration may attend its meetings. But whereas the staff member has to leave when it starts deliberating, the representative may stay on and in his absence answer questions from the SPAB. The complainant pleads that that amounts to disparity between the parties and that the proceedings are not properly adversarial.

Though UNESCO does not challenge his account of the procedure, it says there is no breach of the staff member's right to a hearing since he may have his say without hindrance.

Whether proceedings are judicial or disciplinary, due process requires adversarial proceedings and the evenhanded treatment of both parties. It would in general be a breach of due process to let one of the parties address issues of fact or of law without letting the other attend and comment. Likewise, it may be unfair - for example, in the event of appeal - to let one party attend deliberations and not the other.

But the Tribunal need not consider here how far such principles must apply in internal appeal proceedings that culminate in a final decision.

The SPAB meets at an earlier stage, and how it functions is ordinarily for the Organization to determine. Besides, the staff member does have the opportunity of stating his case, and the representative of the staff on the Board affords a further safeguard of his interests. The procedure does not in itself impair the staff member's rights.

The plea is devoid of merit.

6. The complainant pleads a further procedural flaw in that the SPAB failed to account for its endorsement of the grading by the Bureau of Personnel.

There is a duty to explain a decision or a conclusion because everyone concerned has to know the reasons for it: the staff member, so that he may exercise his right of appeal, and the appeals body or, later, the Tribunal, so that it may exercise its power of review. But the duty will be discharged even if the reasons are stated in some other text to which there is express or even implied reference, for example where a higher authority endorses the reasoning of a lower one or a recommendation by some advisory body.

In this case the SPAB's recommendation obviously endorsed the grading and the reasons for it approved by the Bureau of Personnel. So, though implied, the SPAB's reasoning was quite plain.

The plea again fails.

7. The complainant's internal appeal and complaint both rely on Staff Rule 102.2 and on Manual item 2205. The text of 102.2 that came into force on 9 March 1994 reads:

> "Any staff member who considers that the nature of the duties or the level of responsibilities required of him/her are not compatible with the classification standards or criteria applicable to the grade of his/her post may, at any time, submit to the Director-General a request for the reclassification of the post, provided that there has been a substantial modification in the structure and responsibilities of the unit to which the post belongs, and consequently in the responsibilities of the claimant."

Item 2205, which came into force on 27 October 1976, says:

> "F. ...
>
> 3. Reclassification of a post to a higher grade is based on a substantial increase in the level of duties, responsibilities or qualifications required ...
>
> H. 1. Claims for reclassification made by staff members under Staff Rule 102.2:
>
> a. at the beginning of the biennium ...
>
> b. during the biennium: such claims will be considered by PER after a substantial modification in the structure or responsibilities of a unit not foreseen in the Approved Programme and Budget has been approved by the ADG/ADS and where in consequence the duties and responsibilities assigned to the incumbent of a post have been significantly changed."

In a "Manual issue note" of 19 February 1990 UNESCO announced that item 2205 and others were being updated and the revised texts would be announced shortly. But 2205 had been neither revised nor announced by the time the complainant made his claim: see Judgment 1556 (*in re* Leprince No. 2) under 8 for a similar point.

As worded that note neither repealed nor suspended item 2205: a rule is not impliedly repealed unless there is a higher one with which it conflicts.

There is no conflict between 2205 and 102.2: both provisions require "substantial modification in the structure and responsibilities" of the post for the application for regrading to succeed.

8. So was there such "substantial modification" between the last grading of the complainant's post, in November 1994, and his application of 21 March 1995 for review?

He scarcely contends that there was. Indeed in the second brief he submitted to the Appeals Board he said:

> "I never made out that the actual level of my post changed between 1994, when Personnel approved the desk audit description and March 1994 [*recte* 1995], when I applied for a desk audit."

Yet he offers several reasons why the requirement does not apply:

(a) General principle has it that administrative law must invariably be strictly observed.

Yet by common consent legal relations must be stable, in international organisations as elsewhere, and so the scope for review of grade must be limited. There is no objection to the requirement that the complainant is challenging.

(b) The complainant says that he misunderstood the position when he learned of the grading of his post on 22 November 1994. For one thing, he says he believed he was free to ask for review at any time. For another, he did not then grasp how important his duties and responsibilities were. There was, he argues, a "substantial modification" as against what he had been expecting.

Staff Rule 102.2 is plain enough: there must have been "substantial modification" since the last grading. Besides, the mistakes which he relies on, and which are his own, do not bar the application of the rule to him. And that conclusion is perfectly acceptable since he will be free to apply for regrading once the requirement is met.

(c) He argues that to see whether there has been "substantial modification" the comparison must be with his job as it was in April 1994, when his unit did different work and was known as Operations. It has, he says, since undergone big changes that warrant regrading his post.

The argument is not a cogent one. The decisive date was that of the last grading, by which time the new duties and responsibilities of his post had been determined.

If there was no great change in them there are no grounds for review. Even supposing that the grading was questionable, the complainant may not try to challenge it now by making out that the points on which it was based were too low.

Whatever the Administration's representative may have said to the SPAB, the Director-General did not misuse his wide discretion in taking the view that the requirement for review of the grading was not met.

The plea fails.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

A.B. GARDNER

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FOURTH SESSION

***In re* Gosselin** **Judgment 1674**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Daniel Gosselin against the European Patent Organisation (EPO) on 27 September 1996, the EPO's reply of 20 December 1996, the complainant's rejoinder of 9 Avril 1997 and the Organisation's surrejoinder of 9 June 1997;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The staff of the European Patent Office, the secretariat of the EPO, has medical insurance coverage under a collective contract concluded by the Organisation with a group of insurers. Management is in the hands of a company known as Van Breda.

The complainant, a Frenchman who was born in 1956, was at the material time in the Office's employ in Munich.

On 7 March 1995 he sent Van Breda a claim to the repayment of 7,639.61 German marks in medical costs. He appended a letter from his doctor stating that he owed only 5,000 marks, the amount of the prior estimate.

In a statement dated 17 March 1995 and again in a letter of 23 March Van Breda refused his claim on the grounds that their medical adviser had found "no medical or other grounds for the examinations carried out". They asked for a "further detailed medical report" so that they could reconsider the matter. In a letter of 27 March 1995 the complainant asked the President of the Office to refund the medical costs or else treat his letter as an internal appeal.

By a letter of 21 April 1995 the Director of Personnel Administration told the complainant that an Invalidity Committee would be meeting to look into "the medical dispute" and asked him to appoint a doctor to represent him on the Committee. He did so on 22 May 1995.

By a letter of 13 June 1995 he asked the President to reverse the decision to set up the Invalidity Committee and again, failing that, to treat his request as an internal appeal.

In a letter of 30 June 1995 the Director of Personnel Administration told him what the Office was doing to settle the dispute without convening the Committee.

The Principal Director of Personnel informed him in a letter of 17 July 1995 that Van Breda were still waiting for the detailed report they had asked for in March and that the Invalidity Committee would be taking the case up again. On the same day he got a second diagnosis from a Dr. Daunderer which he said broadly confirmed his own doctor's.

On 27 September 1996 he filed this complaint against the implied rejection of his appeal of 13 June 1995.

On 17 February 1997 the Appeals Committee, after giving him a hearing, recommended allowing his internal appeals.

By a letter of 18 March 1997 the President reversed the decision of 21 April 1995 to set up an Invalidity Committee but dismissed the appeal of 27 March 1995 claiming the medical costs.

B. The complainant submits that the Office and Van Breda have no reason to refuse his claim to the medical costs and that Van Breda cannot supply any contrary medical opinion in support of the refusal. His appeals of 27 March and 13 June 1995 had led to no decision by 27 September 1996, when he filed his complaint.

In his submission neither the insurance contract nor precedent affords any legal basis for the request for a "medical file" or a "more detailed medical report" and so it is unlawful. It is also in breach of German law, which governs the insurance contract in non-medical matters.

He objects to the convening of the Invalidity Committee: under clause 6 b) of the insurance contract it has no authority to settle medical disputes between Van Breda and an insured person. Besides, the Service

Regulations do not allow the Office to convene such a Committee until all possibilities of arbitration have been exhausted.

He contends that Van Breda infringed clause 6 b) of the insurance contract by refusing to accept the diagnosis of the doctor appointed as arbitrator, Dr. Daunderer, and cites "the double-test principle" which is generally accepted in medical disputes.

Lastly, he submits that the Office failed to meet its obligations. As the policy holder it should have tried to get Van Breda to pay up.

He asks the Tribunal to quash the decision to convene an Invalidity Committee and to order Van Breda to accept Dr. Daunderer's opinion and refund the medical costs plus interest. He claims 50,000 German marks in material and moral damages. By way of subsidiary claim he asks the Tribunal to condemn Van Breda's practice of demanding full and detailed medical reports.

C. In its reply the Organisation blames the complainant and his own doctor for the delay in setting up the Invalidity Committee, which does have authority under Article 90(1) of the Service Regulations. So he had no reason to go to the Tribunal before exhausting the internal means of redress. His complaint is therefore irreceivable. Besides, by the time he filed his appeal against the letter of 21 April 1995 he had already complied with the request that he appoint a doctor to the Committee.

In a subsidiary argument the Organisation submits that the complaint is devoid of merit. Van Breda did explain the refusal of repayment since they said their medical adviser had found no medical grounds for the treatment the complainant had undergone.

The dispute is unquestionably about a medical matter. What Van Breda asked for was a "fuller medical report", not access to the complainant's medical file. That request was in keeping with the insurer's right of supervision, and the complainant does not challenge either that there is such a right or what it amounts to. Van Breda's medical adviser was quite entitled "to seek further information" if he had doubts about the need for treatment.

The Organisation also submits that clause 6 b) of the insurance contract does not apply to this dispute, which is between an insured staff member and Van Breda. Consequently, Dr. Daunderer is not an "arbitrator" within the meaning of that clause, and Van Breda were therefore under no obligation to accept his findings.

The subsidiary claim to a ruling against Van Breda is irreceivable because it was not made in the internal appeal.

D. In his rejoinder the complainant alters his claims in the light of what has happened since the filing of his complaint. He drops his claim to the quashing of the decision to set up the Invalidity Committee but wants the Tribunal to declare that the Committee lacked authority to take up his case. He presses his other claims.

Citing the Appeals Committee's unanimous opinion, he maintains that there are no medical grounds for refusing repayment. That, he says, is what really matters in determining whether Van Breda were right to refuse his claim and the Organisation to set up the Invalidity Committee. He denies ever agreeing to the convening of the Committee: he appointed a doctor simply to preserve his rights. He denies holding things up and accuses the Organisation of trying to discredit him.

The legal advisers of Van Breda and the Office acted in breach of medical secrecy by exchanging information without leave to do so. And by appointing its medical adviser to the Invalidity Committee the Office also broke the rule of secrecy which governs the Committee's procedure.

E. In its surrejoinder the Organisation maintains that what the complainant is challenging is the decision to set up an Invalidity Committee, not the refusal to repay medical costs. So the complainant may not rely on that refusal to support any of his pleas. Medical secrecy is therefore immaterial.

CONSIDERATIONS

1. The complainant, a Frenchman who was born on 19 September 1956, works for the EPO as an examiner at grade A3 at General Directorate 2 in Munich.

He said that his health had suffered because of chemicals that a firm had used to disinfect his flat.

The EPO has concluded a collective contract with a group of insurers represented by brokers known as J. Van Breda & Co. International. The policy covers the Organisation's liability towards its staff and includes medical insurance. On 7 March 1995 the complainant put a claim to Van Breda for the payment of 5,000 German marks out of the amount of a bill from his doctor, Dr. Caemmerer.

Van Breda sent him a statement on 17 March showing that they had not allowed his claim. They explained in a letter of 23 March that their medical adviser was "unfortunately not yet able to agree to repayment", having found no "information or medical need warranting the examinations carried out by the doctor". Van Breda wanted another opinion and suggested consulting the EPO's own medical officer, Dr. Hildebrandt.

In a letter of 27 March 1995, which the complainant did not get until 19 June, Van Breda again asked him to see a doctor other than Dr. Caemmerer.

In a letter of 27 March he asked the President of the Office to pay Dr. Caemmerer's bill or, if not, to treat the letter as an appeal. His request was turned down and his appeal went through as No. RI/31/95.

On 21 April the Director of Personnel Administration told him of the referral of the dispute to the Invalidity Committee in accordance with Articles 89 to 92 of the Service Regulations. By a letter of 13 June the complainant asked the President to reverse that decision. That case too went to the Appeals Committee as No. RI/72/95.

In the hope that the Invalidity Committee would sort things out the Administration went ahead with arrangements for convening it. At that stage the complainant did not really object and he went along with the arrangements. Nor did he expressly ask the Appeals Committee to proceed, notwithstanding the decision to convene the Invalidity Committee.

2. Taking the view that things had dragged on too long, he filed this complaint on 27 September 1996. He seeks the quashing of the implied rejection of his medical claim and of the decision to convene the Invalidity Committee. By a subsidiary claim he asks the Tribunal to condemn Van Breda's practice of systematically requiring "a full or detailed medical report" instead of the detailed diagnosis needed to ascertain "the nature of the illness".

The EPO seeks the dismissal of his complaint on the merits insofar as it is receivable.

3. Although his complaint was pending the Appeals Committee took up his two appeals and in a report of 17 February 1997 to the President recommended allowing them.

By a letter of 18 March the President allowed appeal RI/72/95, the one against the convening of the Invalidity Committee, but rejected RI/31/95, the one against the refusal of his claim to payment of Dr. Caemmerer's bill.

on the grounds that he had so far failed to provide proof of chemical poisoning and Van Breda had adequately explained their refusal.

4. The complainant no longer has a cause of action insofar as he is impugning the decision to convene the Invalidity Committee and indeed he has withdrawn that claim in his rejoinder.

5. His subsidiary claim - to a ruling against Van Breda - is irreceivable on two counts. First, it is new, and so he has failed to exhaust the internal means of redress, as Article VII(1) of the Tribunal's Statute requires. Secondly, it requires a ruling in law on an issue that discloses no cause of action: the issue may be raised and resolved in the context of some substantive claim.

6. As to his claim to repayment of Dr. Caemmerer's bill, there is a question of receivability (Article VII(1) of the Statute) because of the nature of the decision at issue and because the complainant has come to the Tribunal without waiting for a ruling on his internal appeals.

(a) The case law says that a complaint is irreceivable when the decision at issue is not one that adversely affects the complainant. A decision is an act by an officer of an organisation which has a legal effect on the staff member's status: see Judgment 532 (*in re* Devisme). It is not a letter that merely acknowledges receipt of an appeal and says that a decision will be taken later (*ibidem*), or the absence of a reply (the decision being implied) to a letter whose object is to "initiate a discussion" (see Judgment 336, *in re* Hayward). The complainant suffers no injury from having to wait for a later decision which he may impugn, for example when a communication from the organisation informing him that it will repay him as soon as he has supplied the necessary details (see Judgment 1506, *in re* Delos, under 7 to 9). Similarly, an internal appeal, followed by a complaint, is not receivable when the organisation's rules prescribe some formality to be completed first (see Judgment 468, *in re* Jadoul concerning "something which is only one step in a complex procedure and of which only the final outcome is subject to appeal").

In this case the President, who endorsed Van Breda's view, took no final decision to reject the claim. He merely asked for more evidence, which was not obviously unreasonable. He also told the complainant that, failing agreement, the procedure to be followed was the one in Article 90 of the Service Regulations:

> "Duties
>
> (1) The Invalidity Committee shall be responsible for determining action to be taken at the expiry of the maximum period of sick leave ... and for determining ... whether a permanent employee is suffering from permanent invalidity ...
>
> It shall also be competent to decide upon all disputes relating to medical opinions expressed for the purposes of these Service Regulations, on the one hand, by the medical officer designated by the President of the Office and, on the other, by the permanent employee concerned or his medical practitioner.
>
> (2) Cases shall be submitted to the Invalidity Committee either on the initiative of the President of the Office or at the request of the permanent employee concerned."

Clause 6 b) of the collective policy applies to disputes between the policy holder, which is the EPO, and the insurers. Staff members may not deal directly with the insurers. It is common ground that they have to apply to the EPO, which in accordance with Article 83 of the Service Regulations insures them individually against specific risks. So the complainant is mistaken in relying on clause 6 b), especially in support of his contention that the doctor he saw at Van Breda's request was an "arbitrator" within the meaning of 6 b). He is further mistaken in arguing that Article 90 of the Service Regulations does not apply to him on the grounds that Van Breda failed to account for their refusal and there was no medical opinion. Van Breda's position, which the Organisation has endorsed, was not unsubstantiated. And the lack of evidence was a medical issue that he was free to raise in submissions to the Invalidity Committee.

The conclusion is that the Organisation has taken no final decision on the claim and that the dispute procedure provided by the Service Regulations is still open to the complainant, as he himself acknowledges. It is immaterial that in response to his objections the President reversed the decision to set up the Invalidity Committee.

Since it is premature for him to put his claim to the Tribunal, his complaint is irreceivable.

(b) Where the decision-making authority tarries over an appeal, the internal procedure must be deemed exhausted when the complainant has done his utmost to get things going yet no decision is likely reasonably soon: see Judgments 1243 (*in re* Singh No. 2) under 16; 1404 (*in re* Rwegellera) under 8; 1433 (*in re* McLean) under 4 and 6; 1486 (*in re* Wassef No. 8) under 11 and 13; 1534 (*in re* Wassef No. 14) under 3; and the earlier precedents cited therein).

Here the criteria are not met. There was delay over the complainant's internal appeals, not because the Appeals Committee was neglectful or overworked, but because the Administration wanted settlement in the Invalidity Committee. That too is why the Appeals Committee had failed to report when he lodged his complaint. He was kept abreast of what was being done to set up the Invalidity Committee. As late as 14 August 1996 the secretariat sent him an e-mail message bringing him up to date, and he and his doctor took part in the procedure. He raised no objection until 17 September 1996 and never made it clear that he wanted his appeal against the convening of the Committee to be taken up first. He also recounts what he himself did to try and settle out of court.

Not until 17 September 1996 did he ask the chairman of the Appeals Committee when appeal RI/72/95 would come up. The chairman's answer was that he had forwarded that inquiry to the official who was writing the Administration's reply. The complainant sent a message to that official on 20 September 1996 asking when he thought the appeal "might come up" in the Committee. Having got no immediate reply, he filed this complaint on 27 September. On 1 October the Administration answered him that it would be replying to his appeal within a fortnight. Its brief was dated 14 October, the Committee put the appeal down for its session from 9 to 12 December and it reported to the President on 17 February 1997.

So at the date of filing of this complaint the complainant had not done what might reasonably be expected of him. He should have told the EPO and the Appeals Committee that he wanted his appeals to go through without further ado either before the Invalidity Committee was set up or while that Committee was meeting, and should then have waited a reasonable time to see what happened.

On this score again he has failed to exhaust his internal remedies and his complaint is irreceivable.

7. That being so, his main and subsidiary claims fail and so too must his claims to damages.

DECISION

For the above reasons,

1. The complaint shows no cause of action insofar as it challenges the instigation of proceedings before the Invalidity Committee.
2. The complainant's other claims are dismissed.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

MICHEL GENTOT JULIO BARBERIS JEAN-FRANÇOIS EGLI

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FOURTH SESSION

In re Nivelle — Judgment 1675

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Marie-Louise Nivelle against the European Organisation for the Safety of Air Navigation (Eurocontrol) on 27 March 1997, Eurocontrol's reply of 4 July, the complainant's rejoinder of 7 August and the Organisation's surrejoinder of 24 October 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Belgian citizen who was born in 1956, joined the staff of Eurocontrol on 1 May 1990 as an administrative assistant at grade C3. She was assigned to the post of secretary to the head of the Operations Division at Eurocontrol's Upper Area Control Centre at Maastricht. The confirmation of her appointment was subject to the six months' probation provided for in Article 36 of the General Conditions of Employment of the Maastricht Centre.

In a probation report of 12 September 1990 the head of the Operations Division, her reporting officer, declared her aptitude for the post and her relations with colleagues to be "good" but her output, behaviour in the service and punctuality only "satisfactory". Her appointment was confirmed as from 1 November 1990.

In a report of 7 February 1992 for the period from 1 November 1990 to 30 June 1991 the quality of her work and her professional conscience were rated "above average" and on the other ten criteria, including relations with fellow officials, initiative and speed, she was marked "average". The reporting officer acknowledged, however, that she had got off to a difficult start and had coped despite a huge backlog. Her second report, for the period from 1 July 1991 to 31 May 1993, spoke of a decline in the quality of work and in her relations with others. In comments of 30 July 1993 she objected and applied for referral to the appeal assessor, the Director of Maastricht. On 3 August the Director endorsed the report and recommended that she look for another job; if she had not found one by 1 February 1994 he would start proceedings to "establish her incompetence" in her post.

By a decision taken on the Director General's behalf on 23 November 1993 the Director of Personnel transferred her to another section of the Operations Division as from 1 December 1993. She was on sick leave because of depression. She took up her new duties half time at 1 December and worked full time from April 1994. According to a report for the period from 1 June 1993 to 7 June 1995 her relations with others and "ability to understand and solve problems" were unsatisfactory. The reporting officer said that efforts to help her had all failed. She was on sick leave again from 28 August 1995 to 30 April 1996.

In a letter of 6 March 1996 the Director General sent her a report that he had endorsed proposing her dismissal for unsatisfactory performance under Article 52 of the General Conditions of Employment. She sent him her comments on 12 March. The case went to the Disciplinary Board, and in a report of 15 July 1996 it declared her "not professionally competent". By a decision of 31 July the Director General dismissed her for professional incompetence as from 1 August 1996.

By a letter of 26 October 1996 the complainant lodged an appeal with the Director General under Article 91 of the General Conditions of Employment. Having got no reply, she filed this complaint on 27 March 1997. In a report of 16 May, however, the Joint Committee for Disputes, to whom the case had been referred, recommended rejecting her appeal. On 20 May 1997 the Director General told her that he did so.

B. The complainant submits that the Director General has overlooked the fact that, because of a heavy backlog and little help, she got off to a difficult start. The upshot was a bout of depression which the Organisation wrongly puts down to "mental instability".

Secondly, she alleges several breaches of procedure. The report for the period from 1 June 1993 to 7 June 1995 was incomplete. The disciplinary procedure was flawed. Though her counsel was unable to attend the Disciplinary Board's first meeting, Eurocontrol refused his application for adjournment. The Board declined to hear some of her witnesses and to let her answer the evidence given against her. Its opinion was not properly substantiated. Lastly, the Director General ought to have put the matter to the Joint Committee for Disputes. All that goes to show abuse of authority.

The complainant asks the Tribunal to declare the decision of 31 July 1996 unlawful. She claims 2 million Belgian francs in material damages and 500,000 in moral damages. She seeks 250,000 francs in costs. She claims interest on any sums awarded to her.

C. In its reply Eurocontrol submits that she had no more to do than other secretaries in the division. It would have been unfair to find fault while she was settling in, but her unacceptable shortcomings persisted, and she did little better after her transfer.

There were no flaws in the procedure. The complainant failed to challenge her performance reports in time, and besides, the "flaws" she alleges are utterly trifling. The disciplinary procedure complied with the rules. Eurocontrol could not be expected to put up with the consequences of her belated decision to engage counsel. And the other alleged breaches of process are immaterial. As to its treatment of her appeal, Eurocontrol contends that it complied with its own rules of procedure and so her plea is devoid of substance. The Director General did not abuse his authority in dismissing her.

Eurocontrol asks that the complainant bear the costs in full.

D. In her rejoinder the complainant presses her pleas and enlarges on them. To her mind Eurocontrol infringed her right of defence by refusing to adjourn the Disciplinary Board's first meeting. The Director General committed an error of procedure by failing to refer her case to the Joint Committee for Disputes within the time limit of four months set in Article 91(2) of the General Conditions of Employment for answering a staff member's request for a decision.

E. In its surrejoinder Eurocontrol presses its pleas and its counterclaim to costs. It submits that it gave the complainant two-and-a-half months in which to prepare her case and was under no obligation to comply with her counsel's request for adjournment. In any case he did attend the Disciplinary Board's second meeting. Rule No. 12 of the Staff Regulations, which is about disciplinary proceedings, does not require that the staff member be present at the hearing of witnesses. The proceedings were adversarial in that the Board heard both sides and let them see the full case records. The complainant's right of defence did not require "the staging of a full-scale showdown" between them.

CONSIDERATIONS

1. The complainant joined the staff of Eurocontrol on 1 May 1990 as an administrative assistant at grade C3 at its Upper Area Control Centre at Maastricht. On 7 June 1995 her supervisor called her in before writing a report on her performance and warned her that proceedings were to start to dismiss her for professional incompetence.

2. The chairman of the Disciplinary Board was informed of the case on 12 April 1996 and the Board was set up on 30 April. It met several times, held an inquiry as prescribed by Article 6 of Rule No. 12 on disciplinary proceedings, and recommended dismissal. On 19 July 1996 the Director of Human Resources told her that the Director General intended to act on the Board's recommendation but that if she chose to resign instead she might stand a better chance of finding another job. She declined to resign and was dismissed by a decision of 31 July 1996.

3. On 26 October 1996 she filed an appeal against dismissal and it went to the Joint Committee for Disputes in November. Having got no reply by 26 February 1997, she filed this complaint on 27 March 1997 impugning the implied rejection of her appeal. She asks the Tribunal to declare Eurocontrol's decision of 31 July 1996 to dismiss her for incompetence as from 1 August to be improper and unlawful; to order Eurocontrol to pay her "provisional" amounts of 2 million Belgian francs in material damages and 500,000 in moral damages; to award her 250,000 in costs; and to pay interest on any sums awarded to her.

4. She submits, among other things, that the disciplinary proceedings that culminated in dismissal were flawed: Eurocontrol rejected her counsel's application for adjournment of the Disciplinary Board's meeting of 24 May 1996; the Board heard witnesses in her absence; and it did not properly substantiate its recommendation.

5. Eurocontrol does not deny rejecting the application which her counsel made for an adjournment to let him prepare the case. At its meeting on 24 May 1996 the Disciplinary Board held an adversarial "inquiry" of the kind provided for in Article 6 of Rule No. 12 which reads:

> "If the Disciplinary Board requires further information concerning the facts complained of or the circumstances in which they arose, it may order an inquiry in which each side may submit its case and reply to the case of the other side."

In that inquiry, which it held on 26 June, the Board heard witnesses in the complainant's absence.

6. Eurocontrol pleads that the hearing of witnesses need not be adversarial and that the inquiry will be if the Board hears witnesses called by both sides. The plea is mistaken. An inquiry will be adversarial only if the parties attend, or have at least been duly invited to attend, the hearing of witnesses.

7. The conclusion is that the Board's proceedings were flawed in that the complainant's right of defence was not observed.

8. Having been taken on the Board's recommendation, the decision of 31 July 1996 to dismiss the complainant is therefore unlawful and must be set aside, and the case must be sent back to the Organisation so that the procedure may be properly followed.

9. By way of damages for material injury the complainant is entitled to her full pay from the date of dismissal, less the amount of any terminal entitlements she may have received. Interest is payable at the rate of 8 per cent a year on the sums due.

10. By way of damages for the moral injury the complainant suffered she is entitled to an award of 30,000 Belgian francs. She is also awarded costs.

DECISION

For the above reasons:

1. The Director General's decision of 31 July 1996 dismissing the complainant is set aside and the case is sent back to Eurocontrol so that the procedure may be properly followed.
2. Eurocontrol shall grant her full pay, as set out in 9 above, in material damages.
3. It shall pay her 30,000 Belgian francs in moral damages.
4. It shall pay her 100,000 Belgian francs in costs.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-FOURTH SESSION

***In re* Rossi** **Judgment 1676**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Christiane Rossi against the International Labour Organization (ILO) on 26 September 1996 and corrected on 31 October 1996, the ILO's reply of 6 February 1997, the complainant's rejoinder of 12 March and the Organization's surrejoinder of 17 June 1997;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Frenchwoman who was born in 1938, joined the ILO in February 1991 as a secretary on a short-term appointment which was regularly renewed. In May 1992 she was assigned to the Application of Standards Branch (APPL) at grade G.4. On 26 January 1994 the ILO granted her a fixed-term appointment as from 1 January 1994, and Article 5.1 of the Staff Regulations thereby became applicable to her. It says that "An official appointed to a job other than of a temporary nature shall be on probation for the first two years following his appointment".

In three reports the complainant's supervisors appraised her performance from 1 November 1992 to 31 January 1994, from 1 February 1994 to 31 January 1995 and from 1 February 1995 to 30 September 1995. Although they found her professionally competent, they said that she failed to get on with some of her supervisors and fellow staff. They took her to task for quarrelling with another staff member in May and June 1993 and for treating her chief in a way he saw as "quite inadmissible".

On 15 August 1995 the secretary of the Reports Board asked her supervisors whether they recommended extending her appointment. They replied on 12 October 1995 that they did not because she was unable to get on with other staff. On 3 November the Reports Board endorsed their opinion. On 20 December the chief of the Personnel Planning and Career Development Branch (P/PLAN) told her that her appointment would not be renewed beyond 29 February 1996. On 8 January 1996 she filed a "complaint" against that decision under Article 13.2 of the Staff Regulations. On the strength of the Reports Board's comments the chief of P/PLAN sent her official notice of non-renewal in a minute of 29 January 1996. But on compassionate grounds she got one last extension until 30 November 1996.

By a letter of 26 June 1996, the impugned decision, the Director of the Personnel Department told her that the Director-General rejected her "complaint" as devoid of merit.

B. The complainant submits that the reproof in her performance reports is overdone. Her professional competence is not at issue and for all her alleged difficulty in getting on with others, the ILO still renewed her contract and on 26 January 1994 appointed her as a secretary in APPL. She just has "a forceful personality and a keen sense of her own worth". She cites a minute which the staff welfare officer wrote on 20 November 1995 at the suggestion of her second-level supervisor and which says that "there is no objective proof that Mrs. Rossi gets on badly with others".

Secondly, she contends that her fixed-term appointment was not probationary and the Organization was in breach of Article 6.7 of the Staff Regulations, which is about performance appraisals. The reporting procedure "showed several flaws": for example, her supervisors missed the time limit and for the third report got her to sign a blank form. It was all "a put-up job ... done just to get rid of her by the end of 1995".

She asks the Tribunal to quash the impugned decision and award her the extension the rules entitle her to or else the equivalent in damages and redress for "the injury sustained".

C. The ILO replies that the complaint is irreceivable on two counts: the complainant filed no internal appeal alleging flaws in the reporting procedure, and her complaint is one or two days out of time. She must have had notice of the impugned decision by 27 June 1996; yet she did not file until 26 September, thereby missing the ninety-day deadline in Article VII(2) of the Tribunal's Statute.

The Organization's pleas on the merits are subsidiary. Precedent has it that renewal is at the Director-General's discretion and that everyone has a duty to get on properly with others at work. The complainant was — says the ILO — "never left in any doubt that her fixed-term appointment was probationary". The flaws she sees in the reporting procedure have no bearing on the impugned decision. The welfare officer's findings are mistaken, being "rather prompted by sympathy ... than grounded in fact".

D. With her rejoinder, and in answer to the ILO's plea about the time bar, the complainant produces evidence to show that she filed in time. On the merits she rebuts all the Organization's pleas and presses her claims.

E. In its surrejoinder the Organization submits that, though she has complied with Article VII(2) of the Statute, her objections to the reporting procedure are irreceivable. It points out that her rejoinder challenges none of its arguments on the main issues. It presses its pleas on the merits.

CONSIDERATIONS

The facts

1. The complainant worked for the International Labour Office under short-term contracts from February 1991. On 26 January 1994 the Office granted her a fixed-term appointment from 1 January 1994 as a secretary in the Application of Standards Branch (APPL) of the International Labour Standards Department .

2. On 15 August 1995 the secretary of the Reports Board sent the head of the Branch a form headed "Probationary Report" which he was to fill up and send back by 30 September 1995. He returned it on 11 October recommending against extending the complainant's appointment. The Director of the Department agreed.

So did the Reports Board and, lastly, the Director-General.

3. By a minute of 20 December 1995 the Office told the complainant that her appointment was extended, by two months but for the last time, until 29 February 1996. On 8 January she filed a "complaint" under Article 13.2 of the Staff Regulations. In a letter of 26 June 1996 the Director of the Personnel Department rejected it on the Director-General's behalf.

That is the decision that she is now impugning, though she did get an extension of appointment until 30 November 1996 on compassionate grounds.

4. She seeks (1) the quashing of the Director-General's decision not to renew her appointment; (2) an extension of appointment no less favourable than those granted to other staff in the same position in law, or an equivalent and fitting sum in damages; (3) redress for the injury she has sustained; and (4) costs.

Receivability

5. In its reply the Organization argues that, if she got the text of the impugned decision on 27 June 1996, her complaint was filed one day late. But in her rejoinder she shows that the date stamped on the envelope by the post office at Divonne-les-Bains, in France, was 28 June and so she could not have got the letter before that date. The ILO does not contest that in its surrejoinder. Her complaint is therefore receivable.

The merits

6. The complainant submits that the Director-General's decision rests (a) on wrong or tendentious allegations that, though her work was good, she failed to get on with other staff of the branch; and (b) on a misreading of Article 6.7 of the Staff Regulations and the consequently mistaken assumption that her appointment was probationary.

The grounds for non-renewal

7. A steady line of precedent has it that whether to renew a fixed-term appointment is a discretionary decision that is subject to only limited review. So it will ordinarily be set aside only if it was taken *ultra vires* or broke some rule of form or of procedure, or if there was a mistake of fact or of law, or if a material fact was ignored, or if there was abuse of authority, or if an obviously wrong inference was drawn from the evidence.

8. The reason for the non-renewal was that the complainant "did not get on with others at work" and so, "unfortunately", her services could "not be put to good use".

9. In her submission that decision was misconceived: the reports written up to March 1993 did not say that she had an awkward personality or failed to get on with others at work; the former criticism is in the report written in December 1994, the latter in the one of October 1995; and it was

because the report of December 1994 made such a comment that the matter went to the Reports Board.

10. The plea fails. The complainant herself admits that all the reports written after March 1993 refer to poor relations with others at work, and the decision of 26 June 1996 merely confirms the Reports Board's recommendation.

11. It is plain on the evidence that an unaccommodating disposition had embroiled the complainant in tiffs at work. And the welfare officer's report, on which she relies, set no restriction on the discretion of the Director-General, who had to heed all the material records.

12. So there is nothing in the evidence to suggest any mistake of fact in the decision not to renew the complainant's appointment.

The reporting procedure

13. The complainant submits that the Organization failed to comply with the procedure in Articles 5.5 and 6.7 of the Staff Regulations for writing performance reports.

14. She was on a fixed-term appointment as from 1 January 1994. She says that she was not on probation after that date and the Organization was wrong to write what it called a "first report" on the period from 1 February 1994 to 31 January 1995 and a "probationary" one on the period from 1 February 1995 to 30 September 1995: two of her earlier reports — she points out — had borne those headings, for the periods from 2 May 1991 to 31 January 1992 and from 1 February 1992 to 31 October 1992.

15. The reports written before she got her fixed-term appointment are immaterial since Article 5.1(a) of the Staff Regulations says:

> "An official appointed to a job other than of a temporary nature shall be on probation for the first two years following his appointment. After the first 18 months of service the official's performance and official conduct shall be evaluated by his responsible chief in accordance with the procedure established in article 5.5."

And 5.5(2):

> "The probationary performance appraisal will be considered as the second appraisal for the purpose of article 6.7."

The rules governing conditions of service of short-term officials, which applied to the complainant before 1 January 1994, required no probation. The only possibility of treating any prior period of service as probationary is, according to Article 5.3, where it is so treated "on the recommendation of the responsible chief endorsed by the Selection Board or on the recommendation of the Board". The complainant adduces no evidence of any such recommendation.

16. The upshot is that the ILO was right to treat her as being on probation from January 1994.

17. She pleads flaws in the reporting procedure. Though the Organization acknowledges the delay in writing the reports, it submits that on that score her 13.2 "complaint" of 8 January 1996 was obviously out of time — a point that she does not rebut in her rejoinder — and so her present complaint is irreceivable because she has failed to exhaust her internal remedies.

18. At all events the delay was too trifling to cause her any actionable injury. The reports did serve the purpose of keeping her aware of her supervisors' disapproval of her behaviour. She knew of it by the time she saw the report of 2 December 1994 and so had plenty of opportunity for improvement before there came the recommendation of October 1995 on which the Director-General acted. And she fails to prove her charge of tampering with the texts and indeed any of the other flaws she is relying on.

19. The conclusion is that the Director-General's decision was in line with the Staff Regulations and the ILO's interests and the complaint must fail.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FOURTH SESSION

In re **Avia Aranda** **Judgment 1677**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Antonio Avia Aranda against the International Telecommunication Union (ITU) on 12 March 1997 and corrected on 19 March, the ITU's reply of 21 April, the complainant's rejoinder of 22 May and the Union's surrejoinder of 17 July 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Under ITU Staff Regulation 3.8 a) a special post allowance is paid to "any staff member who is temporarily required to assume the responsibilities and duties of an existing post in a higher grade". Regulation 3.8 b) says:

> "Exceptionally, when additional temporary work of at least four weeks duration, e.g. for conferences, has to be provided for, the Secretary-General is authorized to pay the special post allowance for a period not exceeding six months and starting from the date on which the staff member takes up duties the level of which corresponds to a higher grade."

Paragraph c) of 3.8 says that the amount of the allowance shall be "equivalent to the salary increase the staff member would have received had he been promoted to the grade of the post in which he is serving".

The complainant, who is Spanish, joined the staff of the ITU on 1 August 1993 in its Common Services Department as head of Archives at grade P.2. Late in January 1994 the head of Library and Archives Services retired leaving the post vacant. On the 26th the chief of the Department provisionally gave the complainant the duties of head of Library and

Archives Services. In line with Regulation 3.8 b) the ITU paid him a special post allowance at P.3 as from 1 February 1994. After six months it broke off payment for one month. It then resumed payment with similar breaks of one month every six months.

After a probationary period of two years the complainant's appointment as head of Archives was confirmed as from 1 August 1995.

By a memorandum dated 13 November 1995 the complainant applied to the chief of the Personnel and Social Protection Department for payment of a special post allowance corresponding to P.4, the grade of the post of head of Library and Archives Services. In a memorandum of 16 February 1996 the chief of the Common Services Department asked the chief of Personnel to let the complainant have the allowance as from 1 January 1996. On 2 May the chief of Personnel asked for a new post description on the grounds that the one made in 1977 did not seem to match the complainant's actual duties.

By a decision dated 7 June 1996 the Secretary-General extended payment of his P.3 allowance as from 1 January 1996. On 13 June he asked the Secretary-General to raise the allowance to P.4. On 16 July the Secretary-General refused on the grounds that the post of head of Library and Archives Services and two others in the unit had been abolished at 1 January 1996. By a memorandum of 11 September the complainant lodged an appeal with the Appeal Board against the decision of 7 June. In its report of 22 November the Board recommended reversing that decision and paying him the allowance at P.4 under Regulation 3.8 a) as from 1 January 1996.

On 13 December 1996 the Secretary-General informed the complainant that because the post of head of Library and Archives Services had been abolished he was rejecting the Board's recommendation. That is the decision he is impugning.

B. The complainant submits that from 26 January 1994 until the end of February 1997, when he went on unpaid leave, he performed the duties of the post. As the Appeal Board held, he was entitled to the allowance under Regulation 3.8 a) because after abolishing the post at 1 January 1996 the Union failed to "redefine" the duties formally assigned to him. Since the grade was beyond doubt P.4 he is entitled to the P.4 allowance under 3.8 c).

He wants the Tribunal to declare the decision of 13 December 1996 unlawful, set it aside insofar as it refuses him the allowance at P.4 and order the Union to pay him the allowance at that grade. He claims costs.

C. In its reply the ITU acknowledges that the additional duties the complainant took on do match some that the former head of Library and Archives Services carried out. But it contends that the conditions in 3.8 a) for the grant of the allowance at P.4 were not met: there was no "existing post" at a higher grade of which the complainant was actually performing the duties. There must be a recent post description that sets out the actual duties. Here the description dated back to 1977 and had never been revised. So there was no knowing whether the duties were still the same. Owing to the reforms in the library the post description was out of date and the further duties the complainant took on do not ascertainably warrant P.4. What is more, because of the reforms the post is to be P.3.

D. In his rejoinder the complainant points out that the post was abolished only two years after he had been given the duties. It is the supervisors' duty to see that a post description is up to date. Failing anything more recent the post description of 1977 is the main criterion. Making out that the post is only P.3 does not square with the findings of an outside consultant who helped with the reforms.

E. In its surrejoinder the Union refers the Tribunal to its submissions in the reply and produces the new description of the post which is graded P.3.

CONSIDERATIONS

1. The complainant joined the Union on 1 August 1993 as head of Archives at grade P.2.

The head of Library and Archives Services having retired, he became acting head on 1 February 1994. The post was graded P.4. He continued to carry out the duties until 28 February 1997, when he took one year's unpaid leave.

2. He was being paid a special post allowance at grade P.3 under Staff Regulation 3.8 b). On 13 November 1995 he asked the Personnel and Social Protection Department to pay him the allowance at P.4 in accordance with 3.8 a).

3. On 22 January 1996 the Union abolished the post of head of Library and Archives Services as at 1 January 1996.

4. By a decision of 7 June 1996 the complainant had his 3.8 b) allowance extended as from 1 January 1996, but with a break in May.

5. On 13 June 1996 he asked the Secretary-General to review that decision and grant him the allowance at P.4 under 3.8 a). By a memorandum of 16 July 1996 the Secretary-General refused.

6. On 11 September 1996 the complainant appealed to the Appeal Board against the decision of 7 June 1996 granting him the allowance under 3.8 b) at P.3. In its report of 22 November the Board recommended reversing the decision and granting him the allowance under 3.8 a) at P.4 as from 1 January 1996.

7. By a decision of 13 December 1996, which the complainant is impugning, the Secretary-General rejected the Board's recommendations on the grounds that the post of head of Library and Archives Services, No. S30/P4/234, had been "abolished at 1 January 1996".

8. The complainant asks the Tribunal:

> "to declare the Secretary-General's decision of 13 December 1996 in breach of the Staff Regulations and general principles of law";
>
> "to set it aside insofar as it refuses him the special post allowance at P.4 under Regulation 3.8 a)"; and
>
> "to order the Secretary-General to pay at least 5,000 Swiss francs in costs."

9. The complainant is impugning the decision of 13 December 1996 on two counts: the Union "applied the wrong rule" to reckon his allowance, and it "got the amount wrong".

The material rule

10. It is common ground that the complainant had been receiving a special post allowance at P.3 under 3.8 b) since 1 February 1994 for taking on further duties after the retirement of the head of Library and Archives Services.

11. The reason why the Union applied 3.8 b) was, as the chief of Personnel explained, that the complainant was at the time on probation and a probationer may not benefit under 3.8 a).

12. On 9 June 1995, after two years' probation, the complainant was definitively appointed head of Archives as from 1 August 1995 at grade P.2. At the time he was still acting head of Library and Archives Services. On 13 November 1995 he asked that the allowance paid to him at P.3 under 3.8 b) be converted into one paid at P.4 under 3.8 a).

13. The Union's answer is that the conditions are not met for granting him an allowance under 3.8 a).

14. Regulation 3.8 a) says that a "non-pensionable special post allowance shall be paid to any staff member who is temporarily required to assume the responsibilities and duties of an existing post in a higher grade". So it lays down two conditions. One is that there must be a post at a higher grade than the claimant's; the other that the claimant must be performing the duties of the post. The Union adds a third condition, that the post description must be recent. But it is wrong: there is neither a written rule nor any particular basic principle that lays down that requirement.

15. Regulation 3.8 b) says that "Exceptionally, when additional temporary work of at least four weeks duration, e.g. for conferences, has to be provided for, the Secretary-General is authorized to pay the special post allowance for a period not exceeding six months". As the Board held, the complainant was not doing "additional temporary work", but was, to quote 3.8 a), "temporarily required to assume the responsibilities and duties of an existing post in a higher grade". Having been head of Archives at P.2, he started, on 1 February 1994, to perform and indeed continued to perform the duties of the P.4 post of head of Library and Archives Services.

16. The Union's pleas are that the post did not exist and that the description of it was invalid. They do not hold water. The duties that the ITU gave the complainant in February 1994 were those of post S30/P4/234. Two years went by before the Union abolished the post, and he went on performing the duties anyway. It is obviously the duty of supervisors and of the Personnel Department to keep post descriptions up to date. The latest one, even if not recent, is still the main yardstick.

The amount of the allowance

17. The complainant wants the Tribunal to approve the Appeal Board's recommendation for reckoning his allowance at P.4.

18. His claim succeeds. It is beyond question that the post of head of Library and Archives Services was graded P.4 and that he had been acting head since 1 February 1994.

19. There is no evidence to suggest that abolition of the post meant any change in his duties as acting head. So he is entitled to payment of the allowance at P.4 as from 1 August 1995, the date at which he definitively became head of Archives.

DECISION

For the above reasons,

1. The Secretary-General's decision of 13 December 1996 is quashed.
2. The ITU shall pay the complainant the special post allowance at grade P.4 as from 1 August 1995 in accordance with Staff Regulation 3.8 a).
3. It shall pay him 4,000 Swiss francs in costs.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FOURTH SESSION

***In re* Fabiani (No. 3)** **Judgment 1678**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mrs. Denise Fabiani against the International Telecommunication Union (ITU) on 6 May 1997, the ITU's reply of 18 June, the complainant's rejoinder of 20 August and the Union's surrejoinder of 23 September 1997;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Frenchwoman who was born in 1940, joined the staff of the ITU on 13 September 1978 under a short-term appointment at grade G.6. She was later granted a probationary appointment and then a permanent appointment as from 3 December 1980. On 1 January 1981 she was promoted to G.7 as an administrative assistant. Her post having been upgraded to P.2, she got promotion to that grade on 1 January 1985. On 1 May 1989 she was promoted to P.3.

At its 1995 session the Council of the Union expressed concern about the unfavourable treatment as to pensions, and for that matter as to pay as well, of staff who had been promoted from the General Service to the Professional category. It instructed the Secretary-General to tackle the problem.

In letters of 7 and 29 November 1995 the Secretary-General told the coordinator of a body known as the "G to P" Working Party, which had been set up in 1991, that he intended to take exceptional action and make an offer to each of the officials concerned. They were to be allowed either to keep their then administrative status or else, as from 1 January 1995, to return to the General Service category at the grade which they had held before promotion to the Professional one. The Secretary-General explained that he would not grant payment of the special post allowance to anyone who opted for reinstatement in the General Service category but who was continuing to perform the duties of a post in the Professional category. Anyone in that position would be treated as falling solely within the General Service category and so would lose non-local status and the benefits and allowances that went with it. On 4 December the chief of the Personnel and Social Protection Department forwarded those letters to the complainant.

By a letter of 12 December 1995 the Secretary-General invited the complainant to choose between staying on in the Professional category and going back to the General Service one as from 1 January 1995 on the terms set out in the letters of 7 and 29 November. By a letter of 22 December 1995 the complainant asked him to make her a better offer. On 4 January 1996 the deputy chief of the Personnel and Social Protection Department refused on the Secretary-General's behalf to do so. In a letter of 5 January she agreed to reinstatement in the General Service category at grade G.7 as from 1 January 1995 on the Secretary-General's terms. The change was made at that date by a decision that the Secretary-General took on 14 February 1996. The complainant continued to carry out the same duties as she had been performing at grade P.3.

By a letter of 27 March she submitted an "informal" appeal to the Secretary-General against the decision of 14 February insofar as it denied her the special post allowance. In a memorandum of 24 April he offered a stay of the appeal proceedings until the end of the Council's next session, and she agreed. On 3 July he told her that the Council's decision did not warrant payment of the allowance and that the three-month time limit in Staff Rule 11.1.1.2 b) for appeal to the Appeal Board started that day. On 3 October she lodged her appeal with the Board against the decision of 3 July. In its report of 6 December the Board said it could not recommend paying her the allowance but was in favour of putting her on a G.7 post. She got notice of the report on 9 December 1996. The complainant and other staff who had gone back to the General Service category wrote memoranda on 16 October 1996 and 15 January 1997 to the Secretary-General. By a memorandum dated 7 February 1997 the Secretary-General informed them of the outcome of the Council's debate on the subject. That is the decision she is impugning.

B. The complainant submits that her complaint is receivable. Under Rule 11.1.1.5 the Secretary-General had sixty days in which to act on the Board's report, which she got on 9 December 1996. So the deadline was, she says, 7 February 1997. Even if the memorandum of that date may not properly be treated as a final decision within the meaning of the Tribunal's Statute, the ninety-day time limit in Article VII(3) ran from 7 February. The complaint is therefore in time.

On the merits the complainant observes that she is still performing the duties of a P.3 post and she contends that the Secretary-General's decision not to grant her the allowance is unlawful under Regulation 3.8. She submits that she did not surrender her right to the allowance by opting for reinstatement in the General Service category. The decision also runs counter, in her view, to the principle of equal treatment inasmuch as several staff members who have always belonged to that category and who, like her, are performing the duties of Professional category posts do get the allowance. The decision not to pay her the allowance is unfair since her "downgrading" does not correspond to any change in her duties and is not warranted by any reason related to work.

She asks the Tribunal to declare unlawful the Secretary-General's stand in his memorandum of 7 February 1997, to order the Union to pay her the special post allowance as from 1 January 1995 and to award her 10,000 Swiss francs in costs.

C. In its reply the ITU submits that the complaint is time-barred. The complainant had ninety days in which to lodge it from the expiry of the time limit of sixty days which Rule 11.1.1.5 laid on the Secretary-General for taking his final decision after receiving the Appeal Board's report. The Secretary-General got the report on 6 December 1996. In any event the memorandum of 7 February 1997 may not be treated as the Secretary-General's final decision under Rule 11.1.1.5.

On the merits the Union points out that there was no precedent for the offer it made to staff like the complainant who had been promoted from one category to the other. Those staff were fully aware of their position when they made their choice between no change in their administrative status and reinstatement in their pension rights. The Union questions the complainant's good faith on the grounds that after agreeing to an act which she believes may have been unlawful she is now challenging it before the Tribunal. To her plea of breach of equal treatment as to the grant of the special post allowance the Union retorts that those who are being paid the allowance are not in the same position either in fact or in law as she inasmuch as they benefit under Staff Regulation 3.8 a), which governs staff who hold a permanent appointment and who have been appointed after competition to a "fixed-term post". Nor, in its submission, is there any breach of equity. She knew full well what she was doing in going back to the General Service category, and the change brought her a net rise in salary. Any special post allowance would have to be reckoned on the strength of her current salary at G.7 and so would bring her a further, and unwarranted, increase. The term "downgrading" is inappropriate to describe a measure to which she agreed and which has brought her better pay and pension rights.

D. In her rejoinder the complainant presses her pleas and claims. She maintains that her complaint is receivable: she could not know when the Board's report reached the Secretary-General. Since he did not see fit to take a decision on that report it would be wrong for the Union to benefit from his getting notice of it one working day before she did.

On the merits she contends that there is no objective yardstick for distinguishing her case from that of staff who have always belonged to the General Service category and who are being paid the special post allowance. Though going back to that category did not lower her pay, her earlier promotion to the Professional category did.

E. In its surrejoinder the ITU maintains that her complaint is irreceivable for the reasons set out in its reply and points out that her reinstatement in the General Service category, which she herself applied for, caused her no injury. So she has no cause of action.

CONSIDERATIONS

1. The Union has employed the complainant since 13 September 1978. It gave her short-term appointments and then, on 3 December 1980 a permanent one. On 1 January 1981 it promoted her to grade G.7 as an administrative assistant.

2. On 1 January 1985 it upgraded her post and promoted her to P.2. It promoted her to P.3 as at 1 May 1989 in accordance with Judgment 1092, which the Tribunal delivered on 29 January 1991, on her second complaint.

3. She agreed to return to G.7 and did so at 1 January 1995 according to a decision of 14 February 1996. Her purpose in going back to the General Service category was to avoid the unfavourable consequences of promotion from that category to the Professional one. But her duties were the same as those she had been performing in the Professional category.

4. On 27 March 1996 she applied for a special post allowance. In a reply dated 24 April 1996 the Secretary-General refused. He also proposed a stay of the time limit for appeal to the Appeal Board pending any decision that the Council of the Union might take on the subject of the adverse consequences of promotion in category. She agreed in a memorandum of 3 June 1996.

5. On 3 July 1996 the Secretary-General sent her a memorandum saying that in the light of the Council's decision he was upholding the earlier decisions and the time limit for appeal to the Appeal Board ran from that date.

6. She lodged her appeal on 3 October 1996. In its report of 6 December 1996 to the Secretary-General the Appeal Board said, among other things, that it could not recommend paying her the allowance. She received a copy of the report on 9 December.

7. By a single memorandum of 7 February 1997 the Secretary-General informed several officials that he could not tackle the "G to P problem" until the Tribunal had ruled on the complaints that raised the issue. That is the decision that the complainant is impugning.

8. The ITU submits that her complaint is time-barred under Article VII of the Tribunal's Statute. It cites Staff Rule 11.1.1.5, which gives the Secretary-General sixty days from the date of receipt of the Appeal Board's recommendation to give the staff member notice of his final decision. In its submission the ninety-day time limit for filing a complaint runs either from the date at which the official receives the final decision or from the expiry of the sixty-day time limit for notifying one.

The Union points out that, the Board having sent its report to the Secretary-General on 6 December 1996 and a copy to the complainant on the 9th, the sixty days began on 6 December 1996 and expired on 3 February 1997. Though the complainant then had ninety days in which to go to the Tribunal, i.e. until 4 May, she did not file until the 6th.

9. In her rejoinder she says that, though she did not know when the Board's report reached the Secretary-General, her own copy arrived on

9 December 1996, a Monday and the first working-day after the Board adopted it. The ITU does not challenge that. Since the sixty days therefore ran from 9 December her complaint was receivable under Articles VII(2) and VII(3) of the Statute. In the complaint form she took the Secretary-General's memorandum of 7 February 1997 to her and other staff for the purpose of reckoning the time limit. The reason was that 7 February was the very date of expiry of sixty days from the date at which she had got the copy of the Board's report.

10. The memorandum of 7 February is not the final decision by the Secretary-General within the meaning of Rule 11.1.1.5. It is his reply to two general memoranda dated 16 October 1996 and 15 January 1997 from the complainant and others asking what effect the Secretary-General intended to give to the Council's decisions. Neither of the two memoranda referred to the complainant's appeal, which was at the time pending. Nor did the Secretary-General's memorandum of 7 February 1997. In particular, that memorandum neither mentions the report by the Board nor cites any rule that might have led the complainant to believe that it constituted a final decision on that report. Indeed the complainant herself acknowledges that "it is not at all clear that the memorandum of 7 February 1997 may be treated as a decision" under Rule 11.1.1.5.

11. For the foregoing reasons the memorandum of 7 February 1997 may not be construed as giving her final notice of the rejection of her appeal. The conclusion is that according to Rule 11.1.1.5 the ninety days in which she had to come to the Tribunal began at 4 February 1997, not, as the Union makes out, at 3 February.

12. The time limit for filing her complaint accordingly expired on 5 May 1997. As she confirms in her rejoinder, she did not file it until 6 May. So her complaint is irreceivable for failure to meet the time limit in Article VII of the Tribunal's Statute.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation, the French text alone being authoritative.

EIGHTY-FOURTH SESSION

***In re* Serlooten** **Judgment 1679**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Gérard Serlooten against the International Telecommunication Union (ITU) on 12 December 1996, the ITU's reply of 7 February 1997, the complainant's rejoinder of 6 March and the Union's surrejoinder of 8 April 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Frenchman who was born in 1937, joined the staff of the ITU on 1 May 1961 as a clerk at grade G.4 under a fixed-term appointment. The Union granted him a permanent appointment as from 1 June 1966 and, after several promotions, grade G.7 as from 1 January 1977. From 1982 he performed the duties of a post that was graded P.2. He was later transferred to that post and promoted to P.2 as from 1 July 1986. In 1991 he was promoted to P.3, and then, as from 1 November 1994, to P.4, as a radiocommunication engineer.

At its 1995 session the Council of the Union expressed concern at the unfavourable treatment as to pensions, and for that matter as to pay as well, of staff who had been promoted from the General Service to the Professional category. It instructed the Secretary-General to tackle the problem.

In letters of 7 and 29 November 1995 the Secretary-General told the coordinator of a body known as the "G to P" Working Party, which had been set up in 1991, that he intended to take exceptional action and make an offer to each of the officials concerned. They were to be allowed either to keep their then administrative status or else, as from 1 January 1995, to return to the General Service category at the grade which they had held before promotion to the Professional one. The Secretary-General explained that he would not grant payment of the special post allowance to anyone who opted for reinstatement in the General Service category but who was continuing to perform the duties of a post in the Professional category. Anyone in that position would be treated as falling solely within the General Service category and so would lose non-local status and the benefits and allowances that went with it. On 4 December the chief of the Personnel and Social Protection Department forwarded those letters to the complainant.

By a letter of 12 December 1995 the Secretary-General invited the complainant to choose between staying in the Professional category and going back to the General Service one as from 1 January 1995 on the terms set out in the letters of 7 and 29 November. By a memorandum of 13 December the complainant opted for reinstatement in the General Service category, although he objected to the refusal of the special post allowance and to having to pay back any sums that he had received in 1995 as a staff member in the Professional category. Correspondence ensued, and he asked the Secretary-General in a letter of 18 January 1996 to review the decision that he return the difference in pay between P.4 and G.7 for 1995. By a memorandum of 22 February 1996 the Secretary-General rejected his claim and pointed out that he had himself agreed to pay the amounts back by asking for reinstatement in the General Service category.

Meanwhile, by a decision of 14 February, the Secretary-General had put the complainant back in the General Service category, at grade G.7. He continued to perform the same P.4 duties as before. On 28 February he lodged with the Appeal Board an appeal against the Secretary-General's decision not to pay him the special post allowance and against the requirement that he return the difference in pay. In its report of 26 July the Board said it could not recommend paying the complainant any special post allowance but was in favour of assigning him to a G.7 post and relieving him of the requirement to pay the sum back. By a memorandum of 27 September 1996, the decision now under challenge, the Secretary-General told the complainant that he was upholding his earlier decision.

B. The complainant points out that he is still performing the duties of a P.4 post and he contends that the Secretary-General's decision not to grant him the special post allowance is unlawful under Staff Regulation 3.8. He submits that he did not surrender his right to that allowance by opting for reinstatement in the General Service category. The decision also runs counter, in his view, to the principle of equal treatment inasmuch as several staff members who have always belonged to that category and who, like him, are performing the duties of Professional category posts do get the allowance. The decision not to pay him the allowance is unfair since his "downgrading" does not correspond to any change in his duties and has nevertheless meant a cut in pay. As for the requirement that he refund the difference in pay between P.4 and G.7 for 1995, he believes that it is quite unwarranted since he did perform P.4 duties in that year and only later did he opt for reinstatement in the General Service category.

He asks the Tribunal to set aside the decision of 27 September 1996 insofar as it refuses to pay him back the amount of 8,409.80 Swiss francs, reclaimed at the Secretary-General's instructions. He claims the special post allowance as from 1 January 1995 and awards of 10,000 francs in damages and 10,000 in costs.

C. In its reply the Union points out that there was no precedent for the offer it made to staff like the complainant who had been promoted from one category to the other. Those staff were fully aware of their position when they made their choice between keeping their then administrative status and reinstatement in their pension rights. The Union questions the complainant's good faith on the grounds that after agreeing to an act which he believes may have been unlawful he is now challenging it before the Tribunal. To his plea of breach of equal treatment as to the grant of the special post allowance the Union retorts that those who are being paid the allowance are not in the same position either in fact or in law as he inasmuch as they benefit under Staff Regulation 3.8 a), which governs staff who hold a permanent appointment and who have been appointed after competition to a "fixed-term post". Nor, in its submission, is there any breach of equity: *volenti non fit injuria*. The term "downgrading" is inapposite to describe a measure to which the complainant consented and which has brought him an increase in his pension entitlements. He knew full well that according to the terms of his reinstatement in the General Service category as from 1 January 1995 any sum paid after that date to him as a member of the Professional category was refundable.

D. In his rejoinder the complainant presses his pleas and claims. He contends that there is no objective yardstick for distinguishing his case from that of staff who have always belonged to the General Service category and who are being paid the special post allowance. He points out that the purpose of the solution which was proposed to the staff concerned was to safeguard their pension entitlements, and certainly not to penalise them by reducing the amount of their pay.

E. In its surrejoinder the Union points out that the complainant's present status stems from his own acceptance of an offer that was made outside the context of the rules and that any comparison with staff who have not been reinstated in the General Service category is therefore quite irrelevant.

CONSIDERATIONS

1. On 1 May 1961 the complainant joined the General Service category of staff of the ITU. His grade was G.4. From time to time he was promoted, and on 1 January 1977 he reached G.7. At the beginning of 1982 he moved to the Professional category of staff and was put on a P.2 post. He was paid a special post allowance. The Union promoted him to P.2 on 1 July 1986. On 1 November 1994 it promoted him to P.4 on a post for a radiocommunication engineer in the Terrestrial Services Department (TSD). On 1 January 1995 he went back to the General Service category, at grade G.7, so that his pension would not suffer on account of the earlier change in category from General Service to Professional.

2. At its 1995 session the Council of the Union expressed concern about the fate of those promoted from the General Service to the Professional category and asked the Secretary-General to continue efforts to tackle the problem.

3. The Secretary-General accordingly made an exceptional offer to anyone on the staff at 1 January 1996 who had been either promoted from the General Service to the Professional category or granted a special post allowance for some Professional grade under Staff Regulation 3.8 a). Such staff might either:

(a) keep their promotion or 3.8 a) allowance and so their then administrative status; or else

(b) return as from 1 January 1995 to the grade and step they had held in the General Service category before the promotion or the grant of the allowance,

the choice to be made by 5 January 1996.

Anyone who chose between 6 January and 29 February 1996 to go back to the General Service category would do so only as from 1 January 1996. And anyone who was to retire from service in 1996, 1997 or 1998 might go back to the General Service category as at a date which would allow the completion of three-years' service in that category.

4. In a memorandum of 13 December 1995 to the Secretary-General the complainant said he agreed to return as from 1 January 1995 to step 12 in grade G.7. The grade was the one from which he had been promoted to the Professional category, and the step took account of his seniority. But he raised two questions: why was he not to be paid a special post allowance at P.4, and why should he have to pay back various sums he had earned in 1995 as a member of the Professional category?

5. In a reply of 20 December the Secretary-General told him that he might spread over the period left until he retired the repayment of the sums he owed on account of his return to the General Service category.

6. In a memorandum of 18 January 1996 the complainant said that he was still willing to go back to that category, but took issue with the Secretary-General's reply and applied under Staff Rule 11.1.1.2 a) for review of the demand for repayment.

7. The Secretary-General replied in a memorandum of 22 February, he put his case to the Appeal Board on 28 February, and the Board submitted its report on 26 July. On 27 September the Secretary-General gave him a final decision rejecting his claims. That is the decision impugned in his complaint, which he filed on 12 December 1996.

8. He is asking the Tribunal to declare the Secretary-General's decision to be in breach of the Staff Regulations and general principles of law; to set it aside insofar as it refused him payment of the sum of 8,409.80 Swiss francs, which he has refunded to the Union at the Secretary-General's bidding; to order the Secretary-General to grant him the special post allowance payable under Staff Regulation 3.8 as from 1 January 1995; and to award him in damages whatever sum it thinks fit, not to be less than 10,000 francs, and 10,000 in costs.

Breach of the Staff Regulations

9. Regulation 3.8 a) reads:

> "A non-pensionable special post allowance shall be paid to any staff member who is temporarily required to assume the responsibilities and duties of an existing post in a higher grade. This allowance shall be payable as from three

> months after the date on which the staff member has assumed the duties of the post in the higher grade. However, in the case of a fixed-term post advertised in conformity with the provisions of paragraphs c) and d) of Regulation 4.8, and filled internally, the special post allowance shall be payable as from the date on which the new functions are assumed following appointment made as a result of the competition; in this latter case the allowance shall be pensionable if it is granted for a period of more than one year."

10. The Union's plea is mistaken. That provision is not confined to the case of an official on a permanent appointment who is put on a "fixed-term post" as the result of a competition. It applies to anyone who temporarily has to take on the duties of an existing post at a grade higher than his own. Only the second half of the provision ("However, in the case ...") deals with the case of a recruitment to a fixed-term post by competition, and it determines the date at which the allowance is payable and whether it is pensionable.

11. It is common ground that after reinstatement in the General Service category at G.7 the complainant was performing the same duties as he had at grade P.4.

12. Since the Union may at any time give him duties corresponding to his actual grade, only temporarily has he taken on the duties of "an existing post in a higher grade" — P. 4 — than the G.7 one he holds. He therefore qualifies under 3.8 a) for payment of the allowance. Neither the Union's mistaken charge against him of bad faith nor any other consideration relieves it of its duty to apply the rule.

Nor does the Secretary-General need instructions from the Council to apply the Staff Regulations and Staff Rules.

13. The decision of 27 September 1996 is a breach of 3.8 a). It must therefore be set aside insofar as it refused the complainant payment of the allowance as from 1 January 1995, the date at which he returned to the General Service category.

The refund

14. The complainant has begun refunding to the Union various allowances paid him from 1 January 1995 as a member of the Professional category and the difference in pay between P.4 and G.7. He is claiming back 8,409.80 Swiss francs, a sum that corresponds to the difference in pay earned between 1 January 1995 and the date of the decision reinstating him in the General Service category.

15. He may not for one and the same period get both the pay of a P.4 staff member and a special post allowance corresponding to that grade. His claim therefore fails, and so does his claim to an award of damages, which is unwarranted.

16. He is entitled to costs, and the amount is set at 4,000 Swiss francs.

DECISION

For the above reasons,

1. The Secretary-General's decision of 27 September 1996 is set aside insofar as it refused the complainant payment of the special post allowance under Staff Regulation 3.8.
2. The Union shall pay him the allowance as from 1 January 1995.
3. It shall pay him 4,000 Swiss francs in costs.
4. His other claims are dismissed.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

A.B. GARDNER

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-FOURTH SESSION

***In re* Byng-Clarke, Gomes and Wijayadasa**

Judgment 1680

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mrs. Susan Byng-Clarke, Mrs. Marialda Gomes and Mr. Somaratne Wijayadasa against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 26 December 1996, UNESCO's replies of 7 February 1997, the complainants' rejoinders of 19 February and the Organization's surrejoinders of 26 March 1997;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. At the material time the complainants were stationed at UNESCO's Office in New York. On 10 October 1995 the Director of the Office forwarded to them fax memoranda from the Director of the Bureau of Personnel at headquarters in Paris telling them that the Director-General had that very day put them on special leave with pay until further notice. The memoranda to Mrs. Byng-Clarke and to Mrs. Gomes said that the Director-General was "examining the real needs in staff of the New York Office". The one to Mr. Wijayadasa, whose post was to go because of reforms, said that the Director-General was looking into his case. On 11 October the complainants each filed an administrative "protest" but they got no answer. Mr. Wijayadasa went to the Appeals Board on 7 December and Mrs. Byng-Clarke and Mrs. Gomes on the 11th.

By memoranda of 18 January 1996 the Director of the Bureau of Personnel told them of their new assignments. Mrs. Byng-Clarke was to go along with her post as from 1 February 1996 to the UNESCO "desk" on the premises of the United Nations in New York. Mrs. Gomes had her post scrapped and was transferred, also as from 1 February 1996, to UNESCO's Office in Washington D.C. Mr. Wijayadasa's post too vanished and he was to report "in the shortest delay" to UNESCO's Office at Kingston, in Jamaica. He was promoted to grade P.4 as from 1 November 1995, but his transfer did not go through and he was eventually seconded as from 1 March 1996 to the United Nations Programme on AIDS (UNAIDS).

The Appeals Board reported on 5 July 1996. It recommended reversing the decisions, removing any relevant papers from the complainants' personal files and granting them one month's pay each in compensation for "anguish, indignity and prejudice". But by letters dated 4 October 1996 the Director-General rejected their appeals as misconceived both in law and in fact. Those are the decisions under challenge.

B. The complainants contend that the decisions are not substantiated. The Director-General may have been "examining the real needs in staff of the New York Office", but that was no reason to stop them from carrying on as usual. The Organization acted in breach of the rules. Review of the staffing of an office is not akin to any "exceptional circumstances" of the kind mentioned in Rule 105.2(b), which the Organization cited in its submissions to the Appeals Board. In Judgment 809 (*in re* Najman Nos. 1 and 4) the Tribunal said that such a circumstance must be an "unexpected" or "exceptional contingency". The complainants further argue that the impugned decisions were an affront to dignity. The unseemly haste in carrying them out – shortly after two missions by the Inspectorate General to the New York Office – and the want of any basis for them in the rules cast doubt on the standing of staff whose performance had never come under fire. Lastly, they plead breach of due process in that the Organization put them on special leave with pay for the sole purpose, to their mind, of gathering evidence against them of misconduct. Since the inquiries yielded no such evidence the defendant has had to rely *a posteriori* on Rule 105.2(b).

The complainants ask the Tribunal to join their complaints, set aside the impugned decisions, grant them six months' pay in damages for moral injury, order that any relevant document be struck from their personal files and award them 15,000 French francs in costs.

C. In its replies the Organization does not object to joinder even though the facts are not on all fours, but contends that the complaints are irreceivable on the grounds that they show no cause of action, the impugned decisions having been withdrawn upon the complainants' reassignments.

On the merits it makes out that the review of staffing in New York afforded sufficient cause for the decisions. The decisions to put Mrs. Byng-Clarke and Mrs. Gomes on special leave were intended to spare them "frustration" on hearing of the abolition of their posts and to give management time in which to act and to avoid "the undesirable consequences of an unforeseeable reaction" on their part. In Mr. Wijayadasa's case the decision was the outcome of a lengthy consultation and matched a wish he had himself expressed in a letter of 5 June 1995 to be put on special leave with pay up to the date of his retirement, 31 July 1997, should he fail to find other employment. UNESCO says that it did its utmost to work things out and had no malice against him. In its replies to the complaints from Mrs. Byng-Clarke and Mr. Wijayadasa it says that one other purpose of the decisions was to ensure equality of treatment. It safeguarded the complainants' rights, and the Director-General was exercising his discretion in its interests. There was no affront to the complainants' dignity since the Inspectorate General's investigations did not concern them.

The decisions of 10 October 1995 were not hidden sanctions. The complainants were treated with courtesy and their reputation cannot have suffered. Far from losing status Mrs. Byng-Clarke and Mrs. Gomes kept their grade, title and pay and Mr. Wijayadasa was even promoted.

D. In his rejoinder Mr. Wijayadasa points out that he founds his case solely on the suddenness of the decision in October 1995 to put him on special leave. Although the decision did follow lengthy consultation with him, he does not see why the Organization resolved so swiftly to get rid of him when there was still work to be done.

The complainants contend that their complaints are receivable since they have a cause of action: they want the decisions to be declared unlawful because they suffered injury. The Organization has not withdrawn the decisions but merely ceased to give them effect after ordering transfer. There was the greater need to explain the decisions because they went into effect at once. There is no connection between the decisions and the reasons stated for them. In answer to the defendant's explanation Mrs. Byng-Clarke and Mrs. Gomes say that they suffered "frustration" on account of the suddenness of the decisions. Mrs. Gomes finds the allusion to an "unforeseeable reaction" from her both shocking and insulting. Mr. Wijayadasa contends that the suddenness of the impugned decision belies the contention that there was any "process of consultation".

E. In its surrejoinders the Organization presses its pleas. It says that the application of Rule 105.2(b) was fully warranted, in the Organization's interests and in no way detrimental to the complainants' rights. Its behaviour was that of an employer who cared about its staff by seeing to their rapid transfer.

CONSIDERATIONS

1. All three complainants were employed in UNESCO's Office in New York when, on 10 October 1995, they got notice of summary decisions by the Director-General to put them on special leave with pay. They protested, to no avail. They appealed to the Appeals Board on 7 and 11 December 1995. They were then transferred: as from 1 February 1996 Mrs. Byng-Clarke to UNESCO's desk in the United Nations building in New York and Mrs. Gomes to UNESCO's Office in Washington D.C. and as from 1 March Mr. Wijayadasa to the programme known as UNAIDS. On 5 July 1996 the Appeals Board reported on their appeals. It recommended reversing the decisions to put them on special leave – which it saw as arbitrary – removing all papers on the matter from their personal files and granting them each one month's pay in compensation for moral injury. On 4 October 1996 the Director-General refused to follow those recommendations and rejected their appeals as unsound in fact and in law. Those are the decisions they are impugning.

2. The complainants apply for joinder. The Organization does not object though it rightly points out that the facts differ somewhat from case to case. Since the complaints raise the same issues of law they are joined.

3. UNESCO argues that the complaints show no cause of action since the challenged decisions have been withdrawn. It cites the ruling in Judgment 1394 (*in re* Dietrich), among others, that there is no question of "quashing a decision that no longer exists and therefore has no effect in law". But the precedent holds good only where the decision impugned has been retroactively withdrawn and has had no effect in law. The decisions of 10 October 1995 had both material and moral consequences for the complainants, and the transfers of 18 January 1996 neither withdrew, nor even purported to withdraw, the earlier decisions. So the Organization's objection to receivability fails.

4. The provision which UNESCO relied on is Staff Rule 105.2(b):

> "In exceptional circumstances staff members may be required to take special leave with pay, this measure being without prejudice to the rights of the staff member."

The complainants submit that UNESCO misread it because it applies only "in exceptional circumstances". They see the impugned decisions as covert and unexplained disciplinary action that amounted to an intolerable affront and so warrants moral damages.

UNESCO demurs. It wanted, it says, to overhaul its New York Office by doing away with posts and the purpose of the decisions was to relieve management of pressure and neither cause its staff feelings of frustration nor prompt an "unforeseeable reaction" from them. So the decisions squared with the letter and spirit of 105.2(b).

5. Judgment 809 (*in re* Najman, Nos. 1 and 4) of 13 March 1987 explained just what Rule 105.2(b) meant. Its wording "makes it plain that such a decision will be exceptional":

> "Unless leave is granted at [the official's] own wish or he is on sick leave – which is just an incident of employment – a paid staff member is entitled to be given work to do that matches his grade. Any exception the Staff Regulations may authorise is to be narrowly construed."

and:

> "Leave is granted under Rule 105.2(b) for the sake of efficiency when there is some unexpected or exceptional contingency."

Admittedly efficiency did have something to do with UNESCO's decisions: it wanted to carry out reforms that were probably necessary.

But its pleas are not cogent: it offers no evidence of any exceptional circumstance that might have warranted the drastic action it put into immediate effect. As the Appeals Board observed, it acted in breach of the duty of care it owed the complainants. The Director-General does have discretion, and the Organization seeks to rely on it, but obviously it does not stretch to breach of the rules or of the general principles that safeguard the dignity of an international civil servant.

6. The conclusion is that UNESCO's treatment of the complainants was unlawful. There being no need to entertain their plea that it failed to give a proper explanation, the impugned decisions must be set aside. The unlawfulness of the decisions and manner of giving them effect caused the complainants actionable moral injury. Although, as was said in 2 above, all three were not quite in the same factual position, each of them is entitled to the same amount, and the Tribunal sets it *ex aequo et bono* at the equivalent of three months' pay. They also succeed in their claims to the removal from their files of any document relating to the decisions to put them on special leave.

7. They claim costs, and are awarded 15,000 French francs under that head.

DECISION

For the above reasons,

1. The decisions of 10 October 1995 and 4 October 1996 by the Director-General of UNESCO are quashed.
2. The Organization shall pay each of the complainants the equivalent of three months' pay in damages.
3. It shall remove from their personal records any document relating to the quashed decisions.
4. It shall pay them an aggregate sum of 15,000 French francs in costs.
5. Any other claim is dismissed.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Seydou Ba, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

MICHEL GENTOT SEYDOU BA JAMES K. HUGESSEN

A.B. GARDNER

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-FOURTH SESSION

***In re* Aboo-Baker (No. 2)**
(Application for execution)

Judgment 1681

THE ADMINISTRATIVE TRIBUNAL,

Considering the application filed by Mrs. Fawzia Aboo-Baker on 6 March 1997 for the execution of Judgment 1432, the reply of 9 June from the World Health Organization (WHO), the complainant's rejoinder of 11 July and the WHO's surrejoinder of 14 October 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS

1. In her first complaint Mrs. Aboo-Baker claimed the quashing of a decision by the Director-General of the World Health Organization not to confirm her reappointment as from 8 March 1992 and an award of damages. By Judgment 1432 of 6 July 1995 the Tribunal quashed that decision and ordered the Organization to pay her the emoluments it had denied her from 8 March 1992 to 7 March 1994, plus interest at the rate of 10 per cent a year from the date at which each sum had fallen due. It awarded her 10,000 Swiss francs in moral damages and 7,500 in costs and ordered her reinstatement in her pension rights for the material period.

2. In execution of the judgment the Organization paid her the 17,500 Swiss francs in moral damages and costs and she got that amount on 31 August 1995. It paid her another 126,199.39 francs on 28 November 1995 and 2,847.47 on 6 December 1995; 29,210.47 United States dollars on 10 June 1996; another 3,997.44 dollars (5,036.77 francs) on 5 July 1996; and, lastly, 11,959.03 francs on 16 May 1997.

Being dissatisfied with both the reckoning and the manner of payment of those amounts, she has lodged this application for the execution or else the interpretation of the judgment.

3. She objects to the figure of basic salary that the WHO has taken for the purpose of working out her entitlements for the material period. The Organization put her gross salary at 54,879 dollars a year whereas, she says, the sum stipulated in her contract was 59,568. A memorandum of 13 March 1992 that referred to her posting in Namibia did put her basic salary at 59,568. But quite obviously that was the figure due to someone with a dependant spouse or child. In 1991 she asked to have her father — not her husband — treated as a dependant. She did not later change her mind even though her husband was, it seems, just about to join her in Namibia when poor health forced her to leave the country. The WHO was therefore right to base its reckoning on what she would have earned had she stayed on.

It was right to take that figure for the purpose of reckoning her post-adjustment allowance and to treat her as having neither dependant husband nor dependant child for the purpose of reckoning her allowances under Staff Rules 360 and 365. So any claim by her that assumes a gross salary of 59,568 dollars a year must be dismissed.

4. Secondly, she submits that the amounts which she had the Organization make over to her in Swiss francs, though they were stated in dollars, should have been converted at the rate of exchange as of the date at which each sum had fallen due. She wants the Organization to revise the amounts by taking the prevailing monthly rates from March 1992 to March 1994.

Her plea fails. The WHO disregarded neither the terms of the judgment nor any principle of law in converting the sums into Swiss francs at the rate prevailing at the date of payment.

5. Thirdly, she objects to the amount of the interest. She submits that, having taken too long to settle, the Organization owes her 56 days' interest on the 17,500 Swiss francs she got on 31 August 1995 and interest on all the amounts which she had already got or which, according to the claims in her original complaint, were still due to her.

Again she is mistaken. The Organization paid her the awards of moral damages and costs within a reasonable time after the publication of the judgment on 6 July 1995. The various sums paid to her purported to include interest at the rate of 10 per cent a year from the date at which each had fallen due. She offers no evidence of any mistake in working out that interest. In any case she is not entitled to the payment that she claims of interest "on the capital and interest already paid".

6. As for her pension rights, the Organization has properly executed Judgment 1432. She herself admits to being satisfied with the explanation it eventually gave her. And she is wrong to claim interest on a sum which it withheld from the payment it made on 28 November 1995 and which she says it took too long to make over to the United Nations Joint Staff Pension Fund. The delay caused her no injury. As for the interest on the amount of her own contributions to the Fund, which the Organization was to pay, on 16 May 1997 it paid her 2,942.68 dollars under that head. She is entitled to no further sum in interest and that is the end of the matter.

7. Under the heading "Sundry claims" she maintains that the Organization has omitted several payments. She contends that she was entitled to compensation for a score of days of accrued leave, not just the dozen the Organization allowed her. She claims 10,572 French francs, plus interest, to cover the costs of removal from Geneva to Montpellier in July 1992. She believes that the Organization was wrong to dock from her pay medical insurance contributions and the price of an airline ticket which she was unable to use for return travel from Namibia in 1992. Not one of those claims can succeed.

8. First, the Organization's reckoning of her accrued leave was correct. It was right to dock from the total the days off work for which she had claimed sick leave from 24 to 31 December 1991 but which had never been approved.

9. Secondly, it repatriated her to Geneva. Nothing in the Staff Rules required it to refund the costs of her removal from Geneva to Montpellier.

10. Thirdly, Judgment 1432 ordered it to treat her as having been its employee from 8 March 1992 to 7 March 1994. As such she was also to be treated as a member of the medical insurance fund in the same period and as owing contributions on that account.

It is true that the Organization agreed on 23 October 1996 to waive the contributions if she proved coverage by some other insurance scheme during that period and expressly waived entitlement under the WHO one, and she does promise such waiver "so far as necessary". But she has not yet adduced the proof that the Organization demanded of other coverage. With her rejoinder she produces a social security card belonging to her husband,

and it does state that she is covered by his scheme. But it is valid only from 21 August 1996. The issue may remain open. Although it is not proved that the Organization owes the complainant 11,513.87 dollars, the amount deducted against insurance contributions, she may still produce the information the Organization is entitled to see. For the time being she has not.

11. Lastly, though the Organization paid to bring her back from Namibia, she did not return to it the unused part of the airline ticket until 19 June 1996. By then it had missed the deadline for claiming a refund from the airline. So it is right to refuse to bear the consequences of her negligence.

12. The conclusion is that the Organization has executed the judgment properly and even gone further than it need in some respects. It did take long to make some of the payments, but that was understandable: the calculations were complicated and the complainant's own objections required elaborate double-checking. In any event she has no claim to moral damages either on the grounds of any bad faith on the Organization's part — which the evidence does not bear out — or of the delays over payment, for which the payment of interest afforded fair redress.

DECISION

For the above reasons,

The application is dismissed.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI JAMES K. HUGESSEN

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation, the French text alone being authoritative.

EIGHTY-FOURTH SESSION

***In re* Argos, Flösser, Glöckner, Hentze and Olivo**

Judgment 1682

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr. Patrick Argos, Mr. Hans Flösser, Mrs. Godefrida Cornelia Glöckner, Mr. Matthias Hentze and Mr. Jean-Christophe Olivo against the European Molecular Biology Laboratory (EMBL) on 7 December 1995 and corrected on 26 March 1996, the EMBL's reply of 1 July, the complainants' rejoinders of 11 October 1996 and the Laboratory's surrejoinder of 17 January 1997;

Considering the applications to intervene filed by:

Ackermann, W.
Adam, V.
Altwarg, A.
Appleton, P.
Ashman, K.
Ashurst, J.
Bauer, U.
Becker, D.
Beneke, J.
Berrie, F.
Berthet, C.
Bois, J.-M.
Bonte, E.
Bosshard, A.
Bourke, S.
Brachvogel, V.
Breitwieser, J.
Burger, L.
Cabanel, F.
Ceska, T.
Charlesworth, A.
Clarke, M.
Clay, I.
Cliff, S.
Coomber, G.
Cooper, A.
Coppieters, J.
Creighton, T.
Culloo, M.
Cyrklaff, A.
Cyrklaff, M.
Dauvergne, F.
Dauvergne, M.
Dean, D.

Dose, K.
Dotti, C.
Drzonek, H.
Erfle, H.
Eritja, R.
Everitt, P.
Felisaz, F.
Fleckenstein, K.
Foellmer, E.
Fry, H.
Fuller, S.
Gabriel, A.
Garcia Pastor, M. P.
Gawlitta, M.
Gemünd, C.
Gibson, T.
Giner, A.
Goosens, V.
Gounari, F.
Gowan, B.
Hage, M.
Haider, M.
Harper, R.
Härtlein, M.
Heinmöller, E.
Hodson, M.
Holmes, M.
Houthaeve, T.
Hübner, K.
Ittensohn, M.
Ivonen, K.
Jacob, R.
James, D.
Jaschke, M.
Joggerst, B.
Kaiser, M.
Kandels-Lewis, S.
Kapp, U.
Khazaie, J.
Kjaer, C.
Kläring, R.
Kollenz, H.
Kuhlmey, A.
Lafosse, F.
Leillard, S.
Lemaistre, M.
Leonard, K.
Liedtke, I.
Lüll, J.
Mahfood, T.
Mahfood, Z.
Mann, M.
Martín-Almendral, O.
McGowan, M.
McGuigan, C.
Merx, A.
Metcalf, P.
Meyn, L.
Miñana, B.
Moro, H.
Mortensen, P.
Moulton, S.
Mullaney, C.
Nilges, M.
Nurmi, S.
Oestreicher, G.
Öffner, W.
Panayi, D.

Parton, R.
Pastore, A.
Petfalski, E.
Pognant, D.
Polycarpou-Schwarz, M.
Postma, J.
Price, S.
Radeck, E.
Rasmussen, B.
Reckmann, I.
Reid, A.
Renkwitz, V.
Richards, P.
Riedinger, A.
Riedinger, P.
Ritter, G.
Rodriguez-Tomé, P.
Ryder, U.
Saffrich, R.
Salmon, N.
Sawyer, A.
Schaar, H.
Schechinger, E.
Schläger, B.
Schmitt, H.
Schnorr, M.
Scholten, H.
Schwager, C.
Sedita, J.
Seethaler, P.
Simon, A.
Sonntag-Buck, V.
Sossick, A.
Spiegel, M.
Stark, A.
Stegmüller, A.
Sterk, P.
Stettner, C.
Stösser, G.
Sulayici, A.
Tekotte, H.
Teo, H.
Thomas, D.
Thomas, S.
Toldo, L.
Tucker, P.
van der Zandt, H.
Vincentelli, R.
Vintersten, K.
Virta, H.
Vogt, G.
Voie, A.-M.
Walter, A.
Warne, A.
Warne, K.
Way, M.
Weingand, M.
Werner, H.
Wernz, O.
Wierenga, R.
Wilhelm, H.
Wilkinson, C.
Winkler, S.
Wittmann, H.
Zimmer, A.
Zimmermann, J.

Considering the EMBL's letter of 15 April 1997 informing the Registrar of the Tribunal that the Laboratory would not be commenting on the applications;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. What are known as the Coordinated Organizations* have their own system of adjusting staff pay. Since 1 January 1982 the Laboratory has been taking that system as the standard of reference for adjusting the pay of its own staff. So says Staff Regulation R 4 1.01:

> "When reviewing remuneration, the Council [of the Laboratory] shall use as a guide the relevant decisions of the Coordinated Organizations in accordance with the decision taken by Council as laid down in Annex R.A.1."

The Coordinated Organizations have a Coordinating Committee on Remuneration. In 1992 the Committee recommended in its 14th report making adjustments in pay for staff in grades A.2 to A.7 for the period from 1 July 1991 to 30 June 1992. Those grades match 9 to 14 at the Laboratory. To compensate for a change in the operative date from 1 July to 1 January each year the Coordinated Organizations decided, on a recommendation made by the Committee in its 22nd report, to make an interim adjustment to pay for all grades in the period from 1 July to 31 December 1992. On another recommendation in the Committee's 31st report they made a second such interim adjustment for the period from 1 January to 30 June 1993.

At its 20th Session (9 and 10 December 1993) the Council of EMBL took the view that it need not follow the Coordinated Organizations' decisions. It approved only as from 1 January 1994 the adjustment for the period from 1 July to 31 December 1992 and not to apply at all the one for the period from 1 July 1991 to 30 June 1992. At its 21st Session (17 February 1994) the Council also refused the adjustment for the period from 1 January to 30 June 1993. The Director-General informed the staff of those decisions by circular in April 1994.

---

* They include the North Atlantic Treaty Organization (NATO), the Organization for Economic Cooperation and Development (OECD), the Council of Europe, the European Space Agency (ESA), the Western European Union (WEU) and the European Centre for Medium-Range Weather Forecasts (ECMWF).

The Coordinating Committee recommended in its 40th report a new adjustment for the period from 1 July to 31 December 1993 and in its 45th another for the period from 1 January to 31 December 1994. On 28 June 1995 the Council of the Laboratory passed a resolution rejecting the recommendations in the 40th report and adopting those in the 45th as from 1 July 1995. In July 1995 the Director-General and the Administrative Director so informed the staff, explaining that the Laboratory had to safeguard both their jobs and its own finances.

On 26 May 1995 the chairman of the Staff Association had put to the Director-General identical claims to salary adjustment from the complainants and a dozen others. They wanted payment of "the full amount of salary" as from 1 July 1992, in line with the scales approved by the Coordinated Organizations. They also claimed interest thereon. They appended a text setting out proposals by the Staff Association for compromise. In a memorandum of 30 May 1995 to the chairman of the Association the Director-General said that he could not answer the claims because the whole matter was in the hands of a "working group" of the Council, and it was the Council that had sole authority to set pay. On 31 May the Association put to the working group proposals that were in much the same terms as the compromise offered to the Director-General on the 26th.

By a memorandum of 7 July 1995 the Director-General notified the Council's decisions of 28 June to the claimants through the chairman of the Association.

On 26 July the chairman forwarded to the Director-General internal appeals dated 19 July from the complainants and five others together with a "statement of support" signed by another 169 staff. The appeals were against the Director-General's memorandum of 7 July. By letters of 11 September 1995 the Director-General rejected them as time-barred. He declared them devoid of merit besides, on the grounds that the Council was not bound to follow the Coordinating Committee's recommendations. And he waived the need for referral to the Joint Advisory Appeals Board so that the claimants might come straight to the Tribunal. His letters are the decisions now under challenge.

B. The complainants deny that their appeals were time-barred. Contrary to what the Director-General says in his letters of 11 September 1995, the

EMBL Staff Regulations and Rules set no time limit for claims to retroactive payment, and Regulation R 6 1.04, which sets a thirty-day time limit for appeals, draws no distinction between various sorts of decision and does not apply anyway to a retroactive one. Moreover, "successive decisions not to adjust staff pay are by nature repetitive" and so may not be ruled out of time.

The complainants have two pleas on the merits. The first is that the Laboratory broke Regulation R 4 1.01. That provision reflects the EMBL's decision of 9 December 1981 to stop following the system of pay at the European Organization for Nuclear Research (CERN) and to take the Coordinated Organizations' system instead. In their submission that decision binds the EMBL. The Laboratory was therefore in breach of *patere legem*: it decided to stop taking over fully the adjustments approved by the Coordinated Organizations, but it did not amend R 4 1.01. Citing Judgment 1419 (*in re* Meylan and others), which is about the adjustment of pay at the European Southern Observatory (ESO), the complainants contend that R 4 1.01 does not leave it to the Council's discretion whether or not to follow the system the Laboratory has chosen. That would make the whole exercise meaningless and deprive staff of "the certainty, predictability and objectivity that are the mainstays of any system of pay".

Their second plea is breach of the rule against retroactivity. The Council's decision of 28 June 1995 not to apply fully as from 1 July 1992 the adjustments due for prior periods amounts to retroactive change in the policy it adopted in 1981.

They ask the Tribunal to quash the Director-General's decisions of 11 September 1995 and to order the EMBL to pay them as from 1 July 1992 the difference between the pay set by the Coordinated Organizations and their actual earnings, plus interest at the rate of 10 per cent a year. They also seek costs.

C. In its reply the Laboratory submits that the objections to the Council's decisions prior to the one of 28 June 1995 are irreceivable in that they were not raised in any internal appeal lodged within the thirty-day time limit set in R 6 1.04. The pleas against the decision of 28 June are also irreceivable because they rest on the alleged unlawfulness of earlier decisions. The case law does say that if an organisation is in recurrent breach of an obligation every breach gives rise to a new cause of action. But that is so only if the staff member did not know of his rights. The staff did in this case since the

Director-General told them of the Council's decisions after July 1992, which were an obvious departure from the Coordinating Committee's recommendations. Having failed to challenge those decisions, the staff tacitly accepted them and, by the principles of good faith and estoppel, may not now seek retroactive change in pay, which would "disrupt" the organisation's finances.

Secondly, the Laboratory denies breach of the Staff Regulations and Rules. Though they, and the Council's decision of 9 December 1981, are binding unless amended, they lay down no obligation to follow the Coordinated Organizations. That decision said in paragraph 4: "The application of any rate of adjustment from the Coordinated System to the system of EMBL shall be subject to the approval of Council". And R 4 1.01 uses the words "shall use as a guide". All that goes to show that the Council has discretion in the matter and that the purpose is to keep the system "flexible". The Council's only duty is to consider the Coordinating Committee's recommendations, and it did so, but it was still free to apply other criteria in reaching its decision.

Judgment 1419 is immaterial: the Laboratory's rules differ from the ESO's. Only so as to prevent arbitrary decision-making will an international administrative tribunal interfere in the exercise of a governing body's discretion to set pay.

D. In their rejoinders the complainants plead first that what they are seeking is not "pay increases" that would lay a heavy burden on the Laboratory's budget but "adjustments" to offset inflation. They deny tacit acquiescence by the staff in the failure to adjust pay: the Council's decisions after 1992 simply put the matter off and were not an express and final refusal to adjust. Not being one of the Coordinated Organizations, the EMBL did not need to import their system of adjustment into its own rules. But once it did it was bound to follow suit. It is wrong – say the complainants – to make flexibility prevail in law since it offends against the requirement of certainty.

From 1981 to 1992 the custom was to follow the Coordinating Committee's recommendations, and, according to the case law, the custom is now binding.

E. In its surrejoinder the Laboratory maintains that the Council's decisions from 1992 until 1995 were final and explicitly notified to staff in pay slips and circulars. According to precedent "de facto alignment" is not enough to make a practice binding. Nor in this case was the practice followed from any sense of legal obligation. Flexibility is not, of course, the same thing as arbitrariness, and the adjustment and the increase of pay are hard to distinguish.

CONSIDERATIONS

1. The complainants, who are staff of the European Molecular Biology Laboratory (EMBL), have claimed adjustments to pay as from 1 July 1992. They are challenging decisions of 11 September 1995 by the Director-General upholding the refusal of their claims. They are relying on a decision of 9 December 1981 by the Council of the Laboratory and on Article R 4 1.01 of the Staff Regulations. They submit that as to staff pay the Laboratory has been departing farther and farther from the standards followed by what are known as the Coordinated Organizations and must now align their pay therewith as from 1 July 1992.

2. First comes the Laboratory's plea that their claims are irreceivable on the grounds that they may not seek any retroactive adjustment. Its argument runs as follows. By a decision of 28 June 1995 the Council set their pay as from 1 July 1995; the Director-General so informed them by a memorandum of 7 July; they appealed; and the purport of the challenged decisions of 11 September was to reject their appeals. It submits that since the Council had already ignored the rules of the Coordinated Organizations "the Council's final decision of 28 June 1995 is not challengeable on the grounds of failure to follow the Coordinated Organizations' adjustment of pay in 1995". The complainants retort that for want of any rule setting a time limit for challenge to pay they may claim the review of it as from 1 July 1992.

3. In line with Judgment 1329 (*in re* Ball and Borghini) of 31 January 1994 and other precedents the Laboratory's plea must in part succeed. What the complainants asked of the Director-General and are now claiming from the Tribunal is review of their pay since 1 July 1992 on the grounds that the Council had unlawfully stayed the application of adjustments approved by the Coordinated Organizations. As was said in Judgment 1329, allowing such a plea would mean that "in a matter as delicate as setting and adjusting staff pay appeal would lie *sine die* against past decisions". The decisions taken by the Laboratory each year on pay fully supersede earlier ones. In entertaining challenges to individual decisions on the complainants' pay —

the only ones they may challenge — the Tribunal will look at the latest decision of the Council's on pay scales. In this instance the latest such decision is the one of 28 June 1995. The last adjustment approved by the Council — a rise of 1.6 per cent in pay as from 1 January 1994 — dated back to its session of December 1993, and the Council had proved unable to take any further decision on pay for 1995. So the only decisions that the complainants may challenge are those taken on 7 July 1995 and upheld on 11 September 1995 insofar as they refused alignment of pay for 1995 in keeping with the principles they rely on. They may not challenge their pay slips since 1 July 1992 on the grounds of the unlawfulness of earlier decisions by the Council.

4. On the merits they charge the Laboratory with breach of the rule against retroactivity and of Article R 4 1.01 of the Staff Regulations. As to the rule against retroactivity their plea fails. As has been said, the Laboratory was not required in 1995 to go back on decisions taken in earlier years on pay. Indeed the rule barred review of individual decisions that were by then beyond challenge.

5. But the argument about breach of the rules on the adjustment of pay is much more telling. R 4 1.01 says:

> "When reviewing remuneration, the Council shall use as a guide the relevant decisions of the Coordinated Organizations in accordance with the decision taken by Council as laid down in Annex R.A.1."

According to the Council's decision of 9 December 1981, which was still in force at the material time:

> "1. ... for the periodic reviews of the basic salaries of EMBL the procedure of adjustment of the System of Remuneration of the Coordinated Organizations shall be applied as laid down hereinafter;
>
> 2. ... any rate of adjustment applied to the basic salaries in the system of remuneration of the Coordinated Organizations for staff posted in France and in the Federal Republic of Germany with effect from 1 July 1981 or later shall be applied with effect from 1 January 1982 to the basic salary scales of EMBL in force on that date ...
>
> 4. The application of any rate of adjustment from the Coordinated System to the system of EMBL shall be subject to the approval of Council."

6. There is a relevant precedent in Judgment 1419 (*in re* Meylan and others) of 1 February 1995. Like the defendant in that case, the European Southern Observatory, the Laboratory has imported safeguards for its staff into its own rules. True, R 4 1.01 does not commit it to granting them all the adjustments that apply to the staff of the Coordinated Organizations. Yet

the provision does not leave it quite free to apply only in part, let alone to cast aside altogether, the decisions of those organisations. Whatever it does it has a duty to state proper reasons for any departure from those decisions. Of course it may switch to another system or standard of reference and indeed, as is clear from the pleadings, it did so on 4 July 1996. But as long as the Council's decision of 9 December 1981 and the system it endorsed hold good, and even though the standard of reference has in practice been overlooked more than once, the staff are entitled to the safeguards that R 4 1.01 bestows: objective arbitrament and sure figures. Further comment on such issues appears in Judgments 1265 (*in re* Berlioz and others) of 14 July 1993 and 1419.

7. Adjustments to pay in the Coordinated Organizations were supposed to serve "as a guide". Yet the Tribunal is satisfied on the evidence, especially the records of debate in the Finance Committee and the Council's deliberations, that the Laboratory often let budget policy prevail. However understandable that may be, such policy must not supplant the rule of law. The last adjustment — the one approved in 1993 as from 1 January 1994 — fell far short of those put into effect in the Coordinated Organizations. Likewise, the decision that, after much shilly-shally, the Council adopted on 28 June 1995 for that year and that the complainants are objecting to, gave staff in Germany an increase in pay of only 0.3 per cent and staff in France and the United Kingdom none at all. Though the preamble to the decision cites the Coordinating Committee's recommendations in its 40th and 45th reports, the reference is a mere formality and EMBL refused the increases recommended in the 40th.

8. R 4 1.01 does vest discretion in the Council to approve adjustments adopted by the Coordinated Organizations. But here the Council paid only perfunctory heed to those adjustments. In sum it did not treat them as a "guide" at all. So the Laboratory broke the rule it had itself undertaken on 9 December 1981 to abide by. The impugned decisions must be set aside insofar as they ignored the decisions of the Coordinated Organizations in setting pay for EMBL staff in 1995.

9. The Tribunal may not itself set the complainants' pay: it must respect the Council's discretion as to just what action to take on decisions by the Coordinated Organisations. It therefore sends the case back so that the Laboratory may, in keeping with its own self-imposed rules, set pay scales for 1995 and pay the complainants accordingly. On any sums due it

shall grant them interest at the rate of 10 per cent a year as from the due date of payment of each sum.

10. The defendant shall also pay them a total of 20,000 French francs in costs.

11. Since the complaints succeed, so too do the applications to intervene insofar as the interveners are in the same position in fact and in law as the complainants.

DECISION

For the above reasons,

1. The decisions of 11 September 1995 by the Director-general of EMBL are quashed insofar as they refused to review the complainants' entitlements to adjustments in pay for 1995.
2. The complainants are sent back so that the Laboratory may take new decisions as set out in 6, 8 and 9 above.
3. The Laboratory shall pay them a total of 20,000 French francs in costs.
4. Their other claims are dismissed.
5. The applications to intervene are allowed insofar as the interveners are in the same position in fact and in law as the complainants.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Seydou Ba, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

MICHEL GENTOT SEYDOU BA JAMES K. HUGESSEN

A.B. GARDNER

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FOURTH SESSION

***In re* Salahuddin** **Judgment 1683**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Mohammad Salahuddin against the Food and Agriculture Organization of the United Nations (FAO) on 16 November 1996 and corrected on 12 December 1996, the FAO's reply of 24 March 1997, the complainant's rejoinder of 1 May and the Organization's surrejoinder of 6 August 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for the hearing of a witness;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of Bangladesh who was born in 1942, joined the staff of the FAO in 1981. At the material time he held a fixed-term appointment as an administrative assistant at grade G.7A at Dhaka.

Under a collective insurance contract the staff of the FAO have sickness and accident insurance coverage with a company of brokers known as Van Breda. On 4 May 1993 the complainant put in a claim to the repayment of medical expenses for the treatment of his wife from 16 to 30 April 1993 in the General Farabi Hospital in Dhaka. The total came to 58,495 takas, or 1,480 United States dollars. On 17 June 1993 he was paid 1,350.54 dollars.

From 6 to 10 August 1994 Van Breda carried out an inquiry in Dhaka into the complainant's medical expenses. By a letter dated 28 September 1994 the officer in charge of the social security group of the Personnel Division accused the complainant of submitting false bills on 4 May 1993, told him that he intended to recommend dismissal for unsatisfactory conduct, and gave him five working days in which to comment. By another letter of the same day the Director of the Personnel Division forwarded to him the letter of the officer in charge and approved the proposal. By a letter of 7 October 1994 the complainant rejected the accusations, supplied an attestation from Dr. Moinul Hoque, the doctor who he said had treated his wife at the hospital, and asked the Administration to get in touch with that doctor. By a letter of 28 October the Assistant Director-General in charge of the Administration and Finance Department told the complainant that the charges warranted dismissal for unsatisfactory conduct, but because his fixed-term appointment was to expire anyway at 31 October the decision had been taken not to renew it.

On 5 January 1995 the manager of Van Breda stated in writing that in an inquiry which he had himself conducted the head of Farabi had confirmed that the bill for hospital treatment of "Mrs. Begum Sullaiman" was "false". On 4 January 1996 an employee of Van Breda corrected that statement by saying that "Begum Sullaiman" should read "Sultana Begum".

Meanwhile the complainant had appealed against the decision not to renew his contract in a letter dated 10 November 1994 to the Director-General. The Assistant Director-General in charge of administration and finance dismissed his appeal on 19 July 1995 and he went to the Appeals Committee on 15 August 1995. In its report of 17 May 1996 the Committee recommended allowing the appeal, granting Mr. Salahuddin compensation and carrying out an inquiry in Dhaka and at headquarters to determine who was to blame for "such reprehensible incompetence". The Committee also drew the Director-General's attention "to the financial cost to the Organization for a so lamentably conducted case". By a letter of 7 October 1996 the Director-General dismissed the appeal, and that is the decision under challenge.

B. The complainant contends that the sum of which he claimed the refund was indeed made over to Farabi. He says that there was confusion over the name of his wife and that neither Van Breda nor the FAO made any attempt to get in touch with the doctor who had treated her. He adds that he was not questioned in the course of the inquiry and no one ever showed him the material evidence.

He objects to flaws in the procedure that the Organization followed. He says that the time limit of five days which he was given to answer the charges applied only to headquarters staff. Since the two letters dated 28 September 1994 were not made over to him until 4 October, he had only "24 days notice instead of 31". He submits that the Organization took a whole year after his departure to pay his terminal entitlements and pension and that it has withheld the sum of 1,457.97 dollars paid by Van Breda against the costs of medical treatment of his daughter in 1993.

Lastly, he contends that the FAO's representative in Dhaka and the administrative officer had been harassing him since 1991. He accuses them of holding up one transfer, objecting to a second one, doing their utmost to involve him in a case of fraud over sickness insurance, giving instructions to hold up the arrangements for termination and compelling him to work, under pain of refusal of his pension entitlements, until the end of the project he was working on, i.e. up to 6 July 1995.

He asks the Tribunal to order the FAO to grant him "a quick and proper compensation", pay him for the work he did after the official date of termination, repay the sum of 1,457.97 dollars remitted by Van Breda, and pay him back the 1,350.54 dollars docked from his terminal entitlements. He claims damages for the blocking of his pension entitlements for a whole year and the grant of an appointment in the office of the FAO's representative in Dhaka.

C. In its reply the Organization says that the attempted fraud is proved. The head of Farabi has confirmed that "Mrs. Begum Sultana, the wife of Mr. Mohammad Salahuddin" was not treated there from 16 to 30 April 1993 and that Dr. L.A. Begum, who signed the "discharge certificate", never worked for the hospital. The Organization adds that Dr. Hoque's name was not mentioned until 5 October 1994, two months after the inquiry, and that Van Breda saw no point in getting in touch with him. There being two inconsistent statements, the Organization gave preference to the one by the head of the hospital, who described the documents produced in support of the claim to repayment as "totally false".

The defendant says that the muddle over the name of the complainant's wife occurred only in the statement by the manager of Van Breda after the inquiry was over and that the statement was corrected. The mistake had no effect on the outcome of the inquiry or on the statements by the head of the hospital, who gives the right name. The complainant's argument on that score is irrelevant.

The FAO further contends that the complainant's accusations of harassment are not borne out by any evidence. It rejects his contention that he had to go on working after the date of termination. It maintains that it did not act tardily in processing his pension. It observes that the Manual draws no distinction between headquarters staff and others as to the time limit of five days for answering a disciplinary charge. Lastly, it says that Van Breda decided, because there had been other fraudulent claims from the complainant to reimbursement, to suspend all payments to him. That is why, at the FAO's request, the cheque for 1,457.97 dollars which Van Breda had sent to the FAO for transmittal to the complainant was returned to them. Citing the Manual, the Organization invites the complainant to sort out the matter of his claims with Van Breda.

D. In his rejoinder the complainant says that Van Breda made a mistake over the name of his wife in its inquiry. Besides, the Appeals Committee pointed out that the inquiry was superficial. He says that the statements by the head of the hospital are suspect. He repeats his allegations of harassment and of being forced to work and says that headquarters took too long to put through his internal appeal. He accuses the FAO and Van Breda of seeking to harm his good name.

E. In its surrejoinder the Organization presses its pleas. It says that it was in no position to block the payment of the complainant's pension since it is the United Nations Joint Staff Pension Fund that makes payment.

CONSIDERATIONS

1. The complainant joined the staff of the FAO on 1 September 1981. He served under several fixed-term contracts as an administrative assistant. The last of them was to expire at 31 October 1994, and on the grounds of misconduct the FAO decided not to extend it beyond that date. Van Breda, the insurance brokers, had carried out an inquiry in August 1994 and the Organization believed that he had trumped up certificates in support of his claim to repayment of the costs of treating his wife in hospital. He went to the Appeals Committee, and it recommended allowing his claim. The project he had been working on was over; so the Committee did not recommend reinstating him. But it did take the view that he should have "quick and proper compensation" and should in any event be paid for the work he had

done up to the end of the project. The Committee had had things to say of the Organization's handling of his case, which it described as "lamentably conducted": the inquiry had been flawed, his guilt was not proved, and the rules on the legal relationship between the staff and Van Breda were unclear.

2. The Director-General rejected the Committee's recommendation and so informed the complainant in a letter of 7 October 1996. According to an affidavit – he observed – from the head of the hospital where his wife had supposedly been treated, she had not been in the hospital at all at the time, and so his claim was fraudulent; though such serious misconduct would have warranted disciplinary proceedings, the upshot was that he would not have his appointment extended. That is the decision he is impugning and his complaint is receivable.

3. He wants the Tribunal to set aside the decision not to renew his appointment. He claims an award of damages; pay for the services he rendered from 1 November 1994 until 5 July 1995; payment of the 1,480 United States dollars remitted by Van Breda but deducted from his terminal entitlements, an amount he lowers to $1,350.54 in his rejoinder; and payment of the $1,457.97, for which Van Breda issued a cheque that the FAO returned to the company, to meet costs that are not at issue; compensation for delay in determining his pension entitlements; and reinstatement.

4. He first pleads a formal flaw. On 4 October 1994 he got a letter from the Organization announcing disciplinary proceedings and giving him five working days in which to comment. He submits that the five-day time limit in Manual paragraph 330.325 does not apply to field staff. But he offers not a single argument in support: the paragraph he cites is a general one and in any event the disciplinary proceedings were dropped. Besides, his allegations are mistaken: the charges against him were plain and he was duly given the opportunity of answering them.

5. He contends that the decision not to renew his appointment is unlawful and rests on mistakes of fact. The thrust of his case is that neither the enquiry that Van Breda commissioned nor the affidavits from the hospital where he says his wife was treated are to be credited.

6. On 4 May 1993 he claimed the refund of 58,495 takas against an invoice purporting to cover the cost of treating his wife from 16 to 30 April 1993 in a hospital in Dhaka known as Farabi General. The invoice gave his

wife's name as Mrs. Sultana Begum. A certificate bearing the letterhead of the hospital and the name of the consultant, Dr. L.A. Begum, stated that she had been discharged on 30 April. But statements by senior officers of the hospital and later written affidavits from the head of the hospital and from his wife declared the invoice and the discharge certificate to be forgeries: the hospital had no record of the admission of Mrs. Sultana Begum and had never engaged anyone by the name of Dr. L.A. Begum. One of the two investigators appointed by Van Breda said in a statement dated 5 January 1995 that according to the head of the hospital the invoice for 58,495 takas which "related to the admission on April 16, 1993 of Mrs. Begum SULLAIMAN ... was false". A statement signed on 4 January 1996 by the other investigator said that the invoice, which Van Breda regarded as forged, had been made out in the name of Mrs. Sultana Begum, not Mrs. Begum Sullaiman.

The complainant takes umbrage at the muddle over names. It does indeed, as the Appeals Committee held, show that the investigation was somewhat careless. Yet it does not seem to discredit the findings. The evidence is that the disputed bill and hospital discharge certificate did give the name as Mrs. Sultana Begum. The affidavit from the head of the hospital said that the falsified documents concerned "Mrs. Begum Sultana, wife of Mr Mohammad Salahuddin", and it was only in the statement dated 5 January 1995 from Van Breda that the name "Mrs. Begum Sullaiman" first appeared. It was later corrected. In fact the mistake is understandable since Van Breda's accounts call the complainant's wife, for whom it had made many payments, "Sullaiman Begum" even though the same person was intended. Again, the great delay in making the corrective statement of 4 January 1996 neither casts doubt on its genuineness nor makes it invalid.

The complainant's main item of evidence is a certificate signed by a Dr. Moinul Hoque on 5 October 1994 who was serving in the hospital at the time and who says that Mrs. Sultana Begum was admitted to Farabi on 16 April 1993 for an operation and discharged on the 30th. It is odd that Dr. Hoque, who had since left the hospital, was neither interviewed nor even asked to give confirmation or further information. Obviously the enquiry was not as careful as it should have been. But the Tribunal is satisfied that nothing in the complainant's own statements or in the evidence before it disproves what the hospital told the investigators sent by Van Breda. The decision to renew an appointment is discretionary and the Tribunal will interfere only if there was some such flaw as a mistake of fact or of law or misuse of authority. Despite some inconsistencies and errors of detail it is not proved that the Organization got the material facts wrong, and the Director-General properly exercised his discretion by relying on them. In support of the plea of misuse of authority the complainant alleges that two local officials were hostile and mounted a whole "conspiracy" against him. His charge is not borne out by the evidence.

7. He maintains that he was "forced" to go on working, from 1 November 1994 to 6 July 1995, even after the Organization had given him notice of non-renewal. The decision was taken on 28 October 1994 and he does not allege lack of due notice. The coordinator of the project has provided an attestation saying that he "never appointed" the complainant to do any work after 1 November 1994. The only evidence he adduces in rebuttal is statements in identical language by his son, who acted from time to time as his secretary, and by a part-time driver. So in any event there is no question of accepting his contention that by forcing him to go on working the Organization implicitly renewed his contract.

8. As for his claims to reimbursement, his dispute is with Van Breda. The company was quite warranted in stopping payment in view of the inconsistencies and mistakes in medical certificates and chemists' bills which he had submitted in support of other claims. He objects to the FAO's returning to Van Breda a cheque for $1,457.97. Though that sum does appear to match actual expenses that is a distinct issue to be settled between him and Van Breda.

9. On 15 May 1995 the complainant sent the United Nations Joint Staff Pension Fund in New York an inquiry about his pension entitlements. The Fund forwarded it to the FAO in a letter which the Organization got on 21 July 1995. He accuses it of bad faith in dealing with that inquiry. But the Tribunal is satisfied on the evidence before it, including the texts of correspondence that the defendant cites in its reply, that the charge is unfounded.

10. The conclusion is that the complainant's case fails in its entirety. He is entitled neither to the quashing of the impugned decision, nor to any award of damages, nor to reinstatement.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

MICHEL GENTOT JULIO BARBERIS SEYDOU BA

A.B. GARDNER

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FOURTH SESSION

***In re* Forté** **Judgment 1684**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Jean-Pierre Forté against the European Patent Organisation (EPO) on 30 October 1996 and corrected on 14 November 1996, the EPO's reply of 5 February 1997, the complainant's rejoinder of 6 May and the Organisation's surrejoinder of 11 July 1997;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal and Article 9(6) of its Rules;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Frenchman who was born in 1956, is in the employ of the European Patent Office, the EPO's secretariat, at Munich. He has medical insurance coverage under Article 83 of the EPO's Service Regulations. The Organisation has concluded a collective insurance contract with a group of insurers administered by brokers known as Van Breda.

Asserting that he and his family had suffered poisoning, he sent Van Breda on 15 December 1994 a claim to the refund of medical costs. By a letter of 28 December Van Breda asked him to provide a detailed bill and to undergo examination by the Office's medical officer, Dr. Hildebrandt. Between 30 December 1994 and 25 January 1995 he underwent three examinations, two by Dr. Hildebrandt and the third by his colleague, Dr. Lechner.

In a letter of 21 February 1995 he asked the President of the Office to pay the sum he had claimed from Van Breda or else treat his letter as an internal appeal. On 2 March the Director of Staff Policy told him that because the dispute was on medical matters he was referring the case to the Invalidity Committee under Article 90 of the Service Regulations and asked him to appoint a doctor to the Committee.

Meanwhile the complainant had asked several times to see the three reports written by Dr. Hildebrandt and Dr. Lechner. The Office having refused, he filed an internal appeal with the President in a letter of 24 March 1995. On 24 April the Director of Staff Policy informed him that the Office had not got Dr. Lechner's report and that Dr. Hildebrandt's reports were available to the members of the Committee.

He is challenging the implied rejection of his claims.

B. The complainant submits that his complaint is receivable because so much time has gone by since he filed his internal appeal.

On the merits he contends that Van Breda's refusal to refund his costs is unlawful, especially since it is based on medical reports he has never seen.

He pleads breach of Article 32 of the Service Regulations: the Administration has at least two files about him and the one he did see is incomplete because it does not contain the medical reports on his case. The Organisation has also failed to keep his records confidential since unauthorised people have had access to those reports.

The Office's medical officers broke German law on medical secrecy by letting the Administration see the reports without his consent. They were also in breach of clause 7 of the insurance policy.

He asks the Tribunal to order the EPO:

(a) to pay him 10,000 German marks in damages on each of the following counts: for the moral injury it caused him by appropriating the medical files; for the misconduct of its medical officers in disclosing them; and for the moral injury it caused him by refusing to let him see them;

(b) to let him see any medical file about him or members of his family, subject to payment of 100 marks a day by way of penalty as from the date at which the order is notified to the EPO's administrative services.

(c) to award him 10,000 marks in costs.

C. In its reply the Organisation says that the complaint is not receivable. The complainant himself was to blame for delay in processing his internal appeal. The Invalidity Committee was unable to meet because of a dispute between him and Dr. Hildebrandt, who was not free to submit the medical reports to the Committee without his consent.

In subsidiary argument the Organisation submits that the complaint is devoid of merit. It has three pleas.

First, it explains how Dr. Hildebrandt came to write the first report. The complainant brought several departments of the Office into his dispute with Van Breda, and he sought and obtained a sum in financial aid from the Office, which he was to pay back as his case and his own circumstances evolved. So it was only reasonable for the Office to get the information it required from its medical officer. It refused him access to the first report because Dr. Hildebrandt objected. Since the dispute was about a medical matter he was to see the report anyway once the Invalidity Committee met.

Secondly, it is a general principle of law that insurers may check claims and so must have access to all the available medical information. It was in the exercise of that right that Van Breda asked the complainant to undergo examination by Dr. Hildebrandt and then by Dr. Lechner. Since the reports they wrote were for Van Breda the Office had no authority to show them to him.

Lastly, on 9 August 1996 Dr. Hildebrandt sent the three reports, with leave from the complainant, to Dr. Manenti-Forté, his own sister, whom he had appointed to represent him on the Invalidity Committee. So by the time he filed his complaint, on 30 October, it was mistaken of him to plead breach of his right of defence on the grounds of denial of access to the reports.

D. In his rejoinder the complainant alleges that the sole purpose of the medical examinations was to find him unfit for work. There had not yet been any decision to convene an Invalidity Committee when he first asked to see the medical reports, and the Office had given him financial help before its medical officer examined him. It is the Office, not the Invalidity Committee, that may let him see the reports. He doubts that all the reports went to the Committee and asks the Tribunal to shed light on that issue.

E. In its surrejoinder the Organisation states that it knows of no medical report other than the three intended for the Invalidity Committee. It is the dispute about repayment of medical costs that prompted the three medical reports; the sole object of his internal appeal was the disclosure of them; and so the matter can be settled only in the context of a procedure involving the Invalidity Committee. The duty of medical secrecy in clause 7 of the insurance policy applies only to third parties, not to Van Breda nor to any doctor involved in the dispute. The complainant has no grounds for objecting to the absence of the medical reports from his personal file: Article 32(1) of the Staff Regulations requires that such file shall contain only reports on the staff member's ability, efficiency and conduct.

CONSIDERATIONS

1. The complainant holds a grade A3 post at the European Patent Office in Munich.

He says that his health suffered because of chemicals that a firm had used to disinfect his flat in that city.

Like any other employee of the EPO he has medical insurance coverage under a collective insurance contract which the Organisation has concluded with a group of insurers represented by a firm of brokers, J. Van Breda & Co. International.

He submitted to Van Breda a claim to the refund of medical costs. Van Breda refused it, apparently questioning the nature of the ailments, doubting the usefulness and cost of the treatment and rejecting invoices from his doctor, Dr. Caemmerer.

To help him out the Office lent him 50,000 marks in December 1994, to be paid back as things took their course.

The EPO's medical officer, Dr. Hildebrandt, who is not a member of its staff, examined him on 30 December 1994 and 4 January 1995 and wrote a report. On 23 January 1995 an EPO officer refused to let him see it and told him to undergo further examination, first by Dr. Hildebrandt and then by Dr. Lechner, a colleague of Dr. Hildebrandt's. He did so on 25 January 1995 and both doctors wrote reports as the Office had asked, apparently on Van Breda's behalf. The reports went to Van Breda.

The complainant wanted to see them but the Office refused on the grounds that they had gone to Van Breda and would be forwarded to the Invalidity Committee just set up to settle his dispute with Van Breda over the bills.

2. On 8 March 1995 he asked the Personnel Department to let him see the three reports, but it refused. He filed an internal appeal on 24 March with the President of the Office. The President did not reply and his appeal was passed on to the Appeals Committee on 24 April 1995.

In a letter of 4 May 1995 the chairman of the Committee acknowledged receipt but said that owing to a large backlog he could give no date for hearing the case.

On 27 June 1996 the complainant wrote the chairman a note that went unanswered.

In the week from 5 to 9 August 1996 he telephoned the chairman, who he says told him that no date had yet been set for hearings or even for preliminary discussion.

He claims:

(1) an award of 10,000 marks in damages for the appropriation by the EPO of the doctors' reports;

(2) 10,000 marks in damages for breach of medical secrecy by the medical officers;

(3) another 10,000 marks for not letting him see the medical reports;

(4) disclosure of the doctors' reports and payment of 100 marks a day by way of penalty as from the date of the notification of the order until he is allowed to see the reports;

(5) 10,000 marks in costs.

The Organisation seeks the dismissal of the complaint.

Receivability

3. Article VII, paragraph 1, of the Tribunal's Statute says that for a complaint to be receivable the internal remedies must have been exhausted. But precedent has it that, if there is delay over the final decision, the requirement will be met provided that the complainant has done everything that might be expected of him to get one but the appeal proceedings are unlikely to end within a reasonable time. See Judgments 1243 (*in re* Singh No. 2) under 16; 1404 (*in re* Rwegellera) under 8; 1433 (*in re* McLean) under 4 and 6; 1486 (*in re* Wassef No. 8) under 11 and 13; 1534 (*in re* Wassef No. 14) under 3; and the cases cited therein.

The requirement was plainly met in this case. Having done all that he did, to no avail, the complainant could not reasonably be required to wait any longer, there being no grounds for expecting the Appeals Committee to report soon. The Organisation's domestic difficulties in running its appeal procedure afforded no excuse for denying him due process. And the very nature of his case called for a fairly prompt decision since he says he needed the reports for the purposes of his medical treatment and the defence of his rights.

Whether he may see the case records or any information that concerns him personally is an issue distinct from his claim to costs and one that he may press separately. It is mistaken for the EPO to retort that he may not do so on the grounds that its decision on that issue was merely incidental.

The conclusion is that he has exhausted his internal remedies as to the subject of his internal appeal.

4. He has not done so, however, as to the new claims he has put to the Tribunal about breach of medical secrecy.

5. The EPO contends that he has no cause of action on the grounds that he may see the three medical reports in the proceedings before the Invalidity Committee. He named his own sister, Dr. Manenti-Forté, as his "representative" on the Committee; as such she has seen them; and so can he.

If the EPO had the obligation to let him see the reports if he so asked, it is for the Organisation to show that it has discharged the obligation.

There is no evidence to suggest that he has yet seen them. Handing them over to his sister is not tantamount to letting him see them since it is not established that she is his legal "representative". Someone who is appointed to a committee is not necessarily the representative of the appointing party and empowered to act on that party's behalf. Nor is there any evidence to suggest that the complainant gave his sister authority to represent him.

No doubt his attitude is odd. He has produced a letter of 26 February 1997 from his sister saying that she has seen the three reports. So could he not easily have got them from her, particularly as the EPO had no objection? Actually he does not even say he asked her for them. But that is not remiss of him since if the EPO had the duty to produce them he was entitled to demand that it do so.

So his claim to disclosure of the reports holds good.

6. On 23 August 1997 he sought to file an unsolicited brief in answer to the Organisation's surrejoinder.

The Tribunal's Rules provide ordinarily for the filing of only two briefs by each party. There are no exceptional circumstances warranting a third one from the complainant, and since the arguments in it are immaterial the President of the Tribunal has disallowed it under Article 9(6).

The merits

7. Article 32(6) of the Service Regulations entitles the staff member to see the personal file and 32(5) says that there shall be only one such file for each staff member.

The complainant argues, and the Organisation denies, that those rules apply to medical records too.

Since medical records are strictly personal the staff member's right to see them may not ordinarily be challenged. But there is no need to say for the purposes of this case just how far the right should go, for example whether it holds good if disclosure may prove harmful to the staff member or whether letting a qualified nominee see the records will do.

In this instance the Organisation had no reason not to let the complainant see the medical reports. He plainly needed to know what they said, not just to settle his insurance claim with the Organisation and Van Breda, but also perhaps for the purpose of choosing the right treatment. Indeed the EPO too had asked, with his consent, to see the reports so as to settle its dispute with him. It needed to know whether his ailments and the treatment of them warranted repayment of the medical costs, and whether he was fit for work and so, for one thing, able to pay back its loan. It cites no material fact that would require any particular precautions in his own interests. Indeed it is willing to let him see the reports in the course of the Invalidity Committee's proceedings. Never since he said he wanted to see them has it suggested that it is unwilling to let him do so.

The Organisation states that some of the reports are not or are no longer in its possession because it passed them on to Van Breda. The argument is irrelevant. It commissioned the reports from its medical officer or his substitute; so it can get them back or demand copies. It is likely to recover them eventually anyway.

The reason why the EPO refused to let the complainant see Dr. Hildebrandt's reports was that the doctor himself objected and asked it to treat them as confidential to spare him the risk of trouble from the complainant. But that is not a reason that can hold good against the complainant. It was for the EPO, not their author, to decide what to do with the reports it had asked for. Besides, how could the complainant accuse the doctor of breach of medical secrecy by letting him see the report when the secrecy was in his own interests?

The conclusion is that the reports must be put at his disposal.

Though the EPO scarcely objects any more since it is willing to let him see them in the Invalidity Committee proceedings, its quibbling has further embroiled its dispute with him.

8. In the circumstances he is entitled to an award of 2,000 marks in moral damages. But it is premature to order payment of a penalty for delay.

Since the complainant's main claim succeeds, he is entitled to costs.

DECISION

For the above reasons,

1. The complaint being allowed in part, the Organisation shall take steps to let the complainant see the three reports.
2. It shall pay him 2,000 marks in moral damages and 2,000 in costs.
3. His other claims are dismissed.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

MICHEL GENTOT JULIO BARBERIS JEAN-FRANÇOIS EGLI

A.B. GARDNER

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FOURTH SESSION

***In re* Boland (No. 10)** **Judgment 1685**

THE ADMINISTRATIVE TRIBUNAL,

Considering the tenth complaint filed by Mr. Pierre Boland against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 25 July 1996 and corrected on 20 September, Eurocontrol's reply of 13 December 1996, the complainant's rejoinder of 28 March 1997 and the Organisation's surrejoinder of 11 July 1997;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts of some relevance to this case appear under A in Judgment 1615 of 30 January 1997, which dismissed several complaints, including Mr. Boland's ninth.

The complainant, a Belgian who was born in 1943, joined the staff of Eurocontrol on 4 May 1970. At the material time he was head of the General Services, Library and Documentation Section of the Organisation's Institute of Air Navigation Services, which is in Luxembourg. He held grade A6. As was said in Judgment 1615, the Institute underwent reform in 1995 and some of its staff were redeployed. The reforms prompted objections to breach of due process. The Tribunal held in its judgment that redeployment had not impaired the complainants' status and that their complaints were therefore irreceivable. On 6 June 1995 the Director General ordered the complainant's provisional transfer to the office of the Director of the Institute as from 1 July.

By a notice dated 11 October 1995 the Director General transferred the complainant as from 1 January 1996 to the Organisation's Experimental Centre at Brétigny-sur-Orge, near Paris. He was put on a post for an expert in technical installations. The post had been put up for competition by notice No. CE-95-AT/057 of 19 May 1995. On 10 November 1995 the Director of Human Resources told the complainant that on the instructions of the Director of the Centre his transfer was to take effect at 1 February 1996.

On 12 January 1996 he submitted to the Director General a protest against the two decisions. By a memorandum of 26 January the Director of Human Resources told him that there was no intention of amending the procedure that had hitherto been followed and had culminated in his transfer and that his case was being put to the Joint Committee for Disputes. In a report dated 29 May 1996 a majority of the Committee upheld his case; it recommended awaiting the Tribunal's ruling on the lawfulness of the process of redeployment and settling the case of everyone concerned in the light of that judgment. The complainant is challenging the implied rejection of his claims.

B. The complainant contends, first, that by failing to answer his internal appeal the Organisation has disregarded its duty to account for his transfer. Besides, there was no valid reason to do away with the post he was assigned to in Luxembourg.

His second plea is that the transfer was ordered in breach of the process of redeployment. Unlike the reforms which were made at the Institute as from 1 January 1993 and on which the Tribunal ruled in Judgment 1358 (*in re* Cassaignau No. 3), that process had the effect of abolishing some jobs and creating others. So the Director General was bound under Article 30 of the Staff Regulations to announce all the new and vacant posts, hold competitions and set up selection boards. He could not shirk that requirement merely by citing Article 7, which empowers the appointing authority to assign any staff member by appointment or transfer, and in the sole interests of the Organisation, to a post in his category or service which corresponds to his grade. Article 8 of Rule of Application No. 2, which also affords the basis for redeployment, is unlawful. It is in breach of the Staff Regulations because it allows the Director General discretion to assign someone to a post at his grade without holding any competition.

The complainant observes, thirdly, that he was transferred to the Centre at a time when his post there was up for competition. There was, in his view, misuse of authority in that his duties at the Institute have not been scrapped but split between other staff and his personal and family circumstances were overlooked. He has suffered serious material and moral injury.

He asks the Tribunal to quash the implied decision to reject his appeal of 12 January 1996, set aside the decisions of 11 October and 10 November 1995 and award him moral damages and costs.

C. In its reply the Organisation argues that the complainant's claim to moral damages is irreceivable because he has failed to exhaust the internal means of redress. At no point in the proceedings has he been represented by counsel, either in his internal appeal or before the Tribunal; so he is not entitled to costs.

On the merits it pleads that the decision of 11 October 1995 does meet the requirements of the case law on the substantiation of decisions. The complainant cannot in any event make out that he was unaware of the reasons for his transfer. His objections to the lawfulness of the redeployment are immaterial. Even if the process was unlawful the Director General was entitled under Article 7 of the Staff Regulations, and by virtue of his discretionary authority to run the secretariat, to transfer the complainant at any time and independently of any such process. The Organisation puts forward the subsidiary argument that, as in 1993, the redeployment did not consist in filling vacant posts and that Article 30 was therefore inapplicable.

The publication of notice CE-95-AT/057 did not prevent the appointing authority from filling the post by internal transfer under Article 7 of the Staff Regulations.

The complainant has failed to show misuse of authority. His personal and family circumstances were not overlooked, and any employee of an international organisation with duty stations in several countries can expect transfer at any time in its interests. The complainant has not, in Eurocontrol's submission, suffered any material or moral injury on account of the transfer.

The Organisation invites the Tribunal to award full costs against the complainant.

D. In his rejoinder the complainant contends that his transfer to Brétigny was the outcome of the process of redeployment. So the Tribunal must rule on the unlawfulness of that process. He presses all his arguments.

E. In its surrejoinder the defendant contends that the complainant may no longer challenge the lawfulness of redeployment, the Tribunal having ruled on that issue in Judgment 1615. It presses its objections to several of his claims and maintains all its arguments on the merits.

CONSIDERATIONS

1. The complainant joined the staff of Eurocontrol's Institute of Air Navigation Services in Luxembourg on 4 May 1970. He served there until 31 December 1995. On 11 October 1995 Eurocontrol decided to transfer him as at 1 January 1996 to its Experimental Centre at Brétigny-sur-Orge. By a letter of 10 November 1995 it told him that he would be transferred at 1 February 1996. That was when he took up duty at Brétigny.

2. The background to the case is as follows.

On 31 January 1995 the Personnel Directorate told the staff of the Institute that changes in its work would entail a process of redeployment in four phases. The third phase was redeployment within the Institute and the fourth redeployment elsewhere within Eurocontrol. At a meeting on 24 March 1995 the Director of the Institute announced the start of the process.

The Director General decided on 6 June 1995 to transfer 73 officials. One was the complainant, who was to move temporarily and without any change in grade to the office of the Director of the Institute. By a letter of 14 June the Director of Personnel told him that he would be covered by the fourth phase, in other words that he would be redeployed outside the Institute.

He filed an internal "complaint" on 28 June 1995 against the decisions of 6 and 14 June 1995 but had it rejected by a decision dated 27 October. On 14 November he appealed against that decision to the Tribunal, in his ninth complaint. Judgment 1615 dismissed that complaint on 30 January 1997.

On 12 January 1996 he had submitted a "complaint" against the decisions of 11 October and 10 November 1995 about his transfer and, having got no reply within the time limit in Article VII of the Tribunal's Statute, he inferred rejection. On 25 July 1996 he filed this complaint.

3. In support of his claim to the quashing of the two decisions he pleads Eurocontrol's failure to account for them, the unlawfulness of the

process of redeployment, breach of Articles 7 and 30 of the Staff Regulations, misuse of authority, bad management and breach of his reasonable expectations. He is seeking damages for the material and moral injury that he says the decisions caused him. He claims costs.

4. A distinction must be drawn between his challenge to the process of redeployment and his particular objections to the decisions of 11 October and 10 November 1995. He contends that because the redeployment was unlawful so were the decisions. Thus he says:

> "The order of transfer came in 'phase IV' of a process of redeployment which the complainant has already challenged by internal appeal and then by his ninth complaint ... One claim he made in the complaint was to the quashing of all the transfers ordered in the context of that process ..."
>
> "The challenged decisions were taken in the context of a process of redeployment that the complainant challenged in his ninth complaint ... His pleas in support of this complaint are a shorter version of the arguments in his ninth ..."
>
> "The process of redeployment which led to the impugned transfer is unlawful because it is in breach of Article 30 of the Staff Regulations ..."
>
> "The breach of Article 30 ... suffices to make the process unlawful, and so too, are the decisions it led to, including the complainant's transfer to Brétigny."

Again, in his rejoinder he says:

> "The complainant's transfer to Brétigny is of course the culmination of the process of redeployment ..."
>
> "The complainant maintains that the order of transfer, being the direct outcome of an unlawful process, is itself unlawful."

5. Taking up his ninth complaint, the Tribunal ruled in Judgment 1615 on the lawfulness of the process of redeployment. To reach its conclusion that the complaint was irreceivable it reviewed that process and said, under 10, that there was "no evidence to suggest that redeployment impaired" the complainant's status. In other words, it did not impair any acquired rights of the staff. The reason why the complaint was irreceivable was that the process was lawful: only if the process had been found unlawful could the complaint have been declared receivable.

As was also said in 10, "structural reform is at an organisation's discretion", and in 11, there was "no evidence to suggest that the reforms constituted any misuse of authority".

6. The ruling the judgment hinged on was the lawfulness of the reforms. So any plea that the complainant founds on a challenge to that process is *res judicata* and must fail.

7. Next come his more specific objections to the decisions of 11 October and 10 November 1995. They are unlawful, he argues, because they are not properly substantiated, Eurocontrol having failed to reply to his internal "complaint", and because the abolition of his old post as head of the General Services, Library and Documentation Section in Luxembourg constituted a misuse of authority.

Precedent has it — for example, Judgment 1289 (*in re* Enamoneta) — that an organisation need not give express reasons for all its decisions; it will do if, though not stated in the actual text of the decision, they are given in the defendant's reply to the complaint. The reasons for transferring the complainant to Brétigny-sur-Orge were well known. Because of the reforms at the Institute Eurocontrol did away with some of his former duties and split the rest among other staff. So it had to find for him elsewhere a suitable post that bore his grade. The evidence adduced by both parties shows the reasons for the impugned decisions to have been sound.

The plea of misuse of authority fails because the complainant offers not a jot of evidence in support .

8. He further pleads bad management and breach of his reasonable expectations. Eurocontrol, he says, failed to take account of his own circumstances and his family's, such as the effect of his transfer on his wife's employment. He points out that he had been serving Eurocontrol in Luxembourg ever since joining the staff in 1970 and had many close ties there.

Eurocontrol replies that his objections do not outweigh its own interests and that it never promised to let him stay for evermore in Luxembourg. Indeed he must have known that a career in the international civil service might require him to change duty stations at any time.

9. Since for the foregoing reasons his main claim fails, so too do his claims to damages and costs.

10. The Tribunal disallows the Organisation's counter-claim to an award of costs against the complainant.

DECISION

For the above reasons,

The complaint and Eurocontrol's counter-claim are dismissed.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

MICHEL GENTOT JULIO BARBERIS SEYDOU BA

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FOURTH SESSION

***In re* Molloy (No. 4)** **Judgment 1686**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr. Brian Michael Molloy against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 27 August 1996, Eurocontrol's reply of 18 December 1996, the complainant's rejoinder of 21 February 1997, the Organisation's surrejoinder of 30 April, Mr. Pierre Boland's comments of 24 July, the complainant's observations of 9 September on those comments and Eurocontrol's final brief of 2 October 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a British citizen, is on the staff of Eurocontrol. On 19 May 1995 the Organisation issued a notice of competition, No. CE-95-AT/057, for a post of expert in technical installations at its Experimental Centre at Brétigny-sur-Orge, in France. The complainant applied for the post. By a decision of 11 October 1995 the Director General transferred to it another official, Mr. Pierre Boland. The complainant submitted his candidature for it on 27 October 1995, the last day for applying.

In a report dated 8 December 1995 the Selection Board recommended three candidates as suitable for the position but declared the complainant unsuitable. By a memorandum of 20 December 1995 the head of the recruitment section told him that his application had been unsuccessful.

By a memorandum of 22 January 1996 he lodged an internal "complaint" alleging breach of Article 30 of the Staff Regulations for failure to consider all the candidates in the competition. His "complaint" was referred to the Joint Committee for Disputes, which recommended rejecting it in a report dated 29 May 1996. By a letter of 6 August 1996, the decision he is impugning, the Director of Human Resources endorsed the Committee's recommendation on the Director General's behalf.

B. The complainant submits that the Administration failed to follow the proper selection procedure. The appointment of another official before the competition had run its course shows that his own candidature did not stand a chance.

He wants the Tribunal to set aside the material appointment and order the resumption of the selection procedure with "the original candidates".

C. In Eurocontrol's submission the complaint discloses no cause of action. Only a candidate that the Selection Board deemed suitable would have an interest in lodging a complaint.

On the merits it points out that the Board gave his candidature serious and impartial consideration. The decision to transfer another official to the vacant post was a proper exercise of discretion and there was nothing wrong with keeping the competition open as a "precautionary measure".

D. In his rejoinder the complainant rebuts the Agency's reply and makes an additional claim, to costs.

E. In its surrejoinder Eurocontrol maintains that the competition was not tainted with any fatal flaw. The claim to costs is new and therefore irreceivable.

F. In comments the Tribunal invited Mr. Boland to make on the complaint he observes that his appointment was part of a process of reform whose lawfulness he himself has challenged. He discusses the appointment procedure and explains that his duties go well beyond those that Eurocontrol mentioned in the notice of competition.

G. The complainant points out that Mr. Boland's submissions are in broad agreement with his own. Mr. Boland's actual duties being far greater than the ones Eurocontrol advertised, the post is so "different" that the complainant sees no need for the Tribunal to quash the appointment: it would suffice to free his post for one of the original candidates.

H. In its final brief the Agency points out that Mr. Boland's actual duties and those announced in the notice are not "radically" different. It alleges "collusion" between the complainant and Mr. Boland, whose grievances the present complaint is, it believes, intended to support.

CONSIDERATIONS

1. The complainant joined the staff of the European Organisation for the Safety of Air Navigation (Eurocontrol) on 1 April 1968. Since 1 April 1992 he has been assigned to Eurocontrol's Experimental Centre at Brétigny-sur-Orge as a senior technical assistant at grade B2.

2. On 19 May 1995 Eurocontrol issued a notice of competition, No. CE-95-AT/057, to fill a post for a category A expert in technical installations at the Centre. The complainant applied on 27 October 1995.

3. In January 1996 he learned that before the closing date the Agency had appointed to the post someone who had not even applied. In the context of reforms the Director General had, on 11 October 1995, transferred Mr. Pierre Boland to the post, for which Eurocontrol had announced the competition.

4. The Administration did not tell any of the applicants but went ahead with the competition. A Selection Board met on 8 December 1995 and the complainant was told by a memorandum of 20 December 1995 that he had been unsuccessful.

5. On 22 January 1996 he submitted a "complaint" to the Director General saying that to his knowledge the decision to appoint to the post someone from the Institute of Air Navigation Services, in Luxembourg, had been taken before the closing date for applications. In his submission the appointment was therefore unlawful.

On 6 August 1996 the Director General rejected his "complaint" and on 27 August he came to the Tribunal. He seeks the quashing of the decision of 11 October 1995 to appoint Mr. Boland to the post and an order that the process of selection be resumed "in due form".

The cause of action

6. Eurocontrol argues that the complainant can show no cause of action on the grounds that the Selection Board rejected him: only someone the Board deemed fit for the post would have a cause of action.

The plea fails. The material issue is not whether the Board made the right choice, but whether it was right that the competition should continue after 11 October 1995, the date of the decision to appoint Mr. Boland. So the complaint does disclose a cause of action.

Eurocontrol's conduct

7. Though Eurocontrol announced the competition on 19 May 1995 it put Mr. Boland on the post on 11 October, before the closing date for applications. Mr. Boland had not even applied. Under the material rules it was free to fill the post by competition, direct selection or internal transfer. But it was not free to apply two of those methods at the same time, any more than it was to appoint two people to one and the same post. In applying two methods it ran the risk of incurring inconsistent obligations. It has failed to give any valid explanation of what it did. It merely says that its own interests required filling the post as soon as possible and it did not want to stop the process of selection as long as it had doubts about what Mr. Boland was going to do.

The failure to stop the competition

8. As was said in 3 above, Eurocontrol filled the advertised post on 11 October 1995. Instead of telling the candidates so and acting responsibly it let the competition run on. It went on accepting applications up to 27 October 1995 and on 7 December called the Selection Board. The evidence is that the Board made a short list of three but there is no knowing what happened then. The competition does not seem to have culminated in any decision at all.

The conclusion is that the Agency acted improperly. Though knowing full well that the vacancy had been filled, it let the competition go on to no obvious purpose.

Relief

9. The complainant seeks the quashing of Mr. Boland's appointment. The Organization made that appointment in proper exercise of its discretion, and the decision shows no flaw that warrants setting it aside. But Eurocontrol did go ahead with a competition which, for want of a vacancy, could not come to anything. Though free under the rules to cancel the competition, it failed to do so. By letting the competition go ahead it made itself accountable to the candidates and in the circumstances Eurocontrol must be held liable to the complainant in moral damages and in costs.

DECISION

For the above reasons,

1. The claim to the quashing of the appointment of Mr. Pierre Boland on 11 October 1995 to post CE-95-AT/057 is dismissed.
2. Eurocontrol shall pay the complainant 600 United States dollars in moral damages.
3. Since his complaint succeeds in part it shall pay him 400 dollars towards costs.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

MICHEL GENTOT JULIO BARBERIS SEYDOU BA

A.B. GARDNER

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FOURTH SESSION

***In re* Bedrikow (No. 2)** **Judgment 1687**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Roberto Bedrikow against the International Labour Organization (ILO) on 20 November 1996 and corrected on 30 December, the ILO's reply of 23 April 1997, the complainant's rejoinder of 30 July, corrected on 21 August, and the Organization's surrejoinder of 24 October 1997;

Considering the further submission filed by the Organization on 3 November 1997 at the Tribunal's request, the complainant's comments of 6 November thereon and the ILO's final brief of 14 November 1997;

Considering articles II, paragraphs 1 and 6(a), and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for the hearing of witnesses;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Brazilian who was born in 1962, was employed by the International Labour Office, the secretariat of the ILO, under short-term contracts from 1988 until 1995. His last one, for the period from 1 July to 31 December 1995, came under Rule 3.5 of the Rules governing conditions of service of short-term officials, known as the "Short-term Rules". He accordingly had most of the conditions of service prescribed under the Staff Regulations for a fixed-term appointment.

The Personnel Planning and Career Development Branch (P/PLAN) wrote him a minute on 30 August 1995. It told him that the Organization could not afford to extend his contract. But the Director of the International

Labour Standards Department (NORMES) spoke to him and then, in a minute of 21 November 1995, asked for an extension until 30 June 1996.

On 14 December 1995 the complainant went on leave. On 21 December the Personnel Department drafted an offer to extend his contract until 31 March 1996 and sent it for the chief of the Application of Standards Branch (APPL) to forward to him. On 3 January 1996 the chief of APPL put his initials on the offer and left it in the office that the complainant had been using. On 18 January the complainant sent a fax message asking the chief of APPL to say whether he had any offer for 1996 and, if so, to send it. By a fax of 26 January the chief of APPL told him that the Personnel Department would "be in touch very soon". The complainant sent another inquiry on 30 January and the chief answered on 1 February that his case was with the Personnel Department.

By a letter of 6 February 1996 the Director of the Personnel Department told the complainant that the Office had tried more than once, to no avail, to get an offer of extension to him. She said that he ought not to have left the matter until 18 January, that he had taken unauthorised leave on 20 and 21 December 1995 and that his appointment had, as P/PLAN had warned him on 30 August 1995, expired on 31 December 1995.

After correspondence with the Director of the Personnel Department he lodged a "complaint" on 27 June 1996 with the Director-General under Article 13.2 of the Staff Regulations objecting to "covert and wrongful dismissal", contending that three competitions he had entered showed procedural flaws and claiming payment of repatriation grant and compensation for overtime. On 26 August 1996 the chief of the Personnel Administration Branch (P/ADMIN) replied that because of a backlog his "complaint" was still pending but he would be sent the comments of everyone involved and would then be given the Director-General's final decision. Having received neither comments nor decision, he filed this complaint on 20 November 1996 challenging the rejection he inferred. He was sent the text of the Director-General's final decision on 10 June 1997.

B. The complainant explains that, as was the practice in APPL, the chief of the service gave him informal permission to take 20 and 21 December 1995 off by way of compensation for overtime days. Before leaving he asked the chief of APPL "to send him in Brazil word of any offer of appointment from the ILO".

He submits that by virtue of Rule 3.5 he had what was tantamount to a fixed-term appointment. No-one who has such an appointment may, in his view, be dismissed for reasons other than unsatisfactory performance or serious misconduct or redundancy or lack of funds. There were no financial reasons, since the Office had offered him an extension and then took on someone else in his place; nor was there any of the other grounds for dismissal. So he suffered "wrongful dismissal".

The ILO ought to have given him a hearing before taking the decision. Besides, he says, the decision is not properly accounted for, and the penalty is out of proportion to any offence. The ILO was out to get rid of him for filing his first complaint. The chief of APPL was in bad faith. And so was the whole Organization: it made no real effort to let him have its offer, and then denied ever making it.

He entered two competitions to fill posts in APPL. The ILO did its utmost to get someone else appointed instead, even though he was the Selection Board's choice. There were also several formal flaws: as to the first competition there was no restriction of nationality for entry; written tests were held after the Selection Board had reported; and he was not allowed to write in Spanish; and as to the second competition mistakes by the ILO kept him from taking the test.

It was discriminatory to hold a competition to fill a post in the Freedom of Association Branch (LIBSYND). Having come second in an earlier one for a post in that branch, he was entitled, in keeping with ILO practice, to direct selection. The ILO was wrong not to let him write in Spanish and to put unlawful pressure on the Selection Board, which he says had picked him for the job.

His claims read :

> "1. My reinstatement and payment as from 1 January 1996 until reinstatement in APPL of salary unpaid since that date, plus interest at the rate of 5 per cent a year as from 20 January 1996.
>
> 2. Subsidiarily, failing reinstatement in APPL, payment of moral damages in the amount of 200,000 United States dollars plus interest at 5 per cent a year as from 28 June 1996.
>
> 3. Payment of moral damages in the amount of $65,000 … plus interest at 5 per cent a year as from 28 June 1996 even if the claim to reinstatement under 1 above is allowed.
>
> 4. Payment in full of expenses attributable to dismissal.
>
> 5. In the event of my reinstatement full repayment to the complainant of my and the ILO's contributions which on my dismissal I had to claim

back from the United Nations Joint Staff Pension Fund, plus interest at 5 per cent a year from the date of reinstatement or, failing reinstatement, payment of an amount equivalent to what the ILO would have paid by way of contributions into the Fund on my behalf, plus interest also at 5 per cent a year as from 28 June 1996.

6. Payment of moral damages in the amount of $8,500 for each full month or part of a month from 1 January 1996 until the completion of competition No. V/APPL/4/95.
7. Payment of moral damages in the amount of $8,500 for each full month or part of a month from 1 January 1996 until the completion of competition No. V/APPL/5/95.
8. An order that the ILO should not appoint [a named official] or any other candidate who fails to meet the requirements as to nationality (i.e. only citizens of under-represented countries on the list appended to notice V/APPL/5/95 or Spain) and qualifications as stated in notices V/APPL/4/95 and V/APPL/5/95, and the quashing of any such appointment that may have been made.
9. My appointment to a post in APPL in the above competitions.
10. Subsidiarily, my appointment to a post in APPL by any procedure intended for the purpose.
11. Payment of damages in the amount of $100,000 for moral injury attributable to the attitude of the Personnel Department (or other departments, branches or anyone else) intended to malign and traduce me in the eyes of members of selection boards and others.
12. Quashing of the appointment of [another named official] to a post in LIBSYND in competition No. V/LIBSYND/14/95.
13. My appointment to the post at present held by [the named official in 12] and payment of an amount equivalent to full monthly pensionable remuneration, plus interest at 5 per cent a year as from the date of [her] appointment.
14. Payment of moral damages in the amount of $100,000 should the Tribunal be satisfied on the evidence that competition V/LIBSYND/14/95 was tainted with unlawful pressure by the ILO
15. Payment of the repatriation grant under Article 11.15 of the Staff Regulations, account being taken of the period of continuous service outside my home country since 4 October 1993.
16. Payment in full for the overtime I did at the tripartite maritime meeting held in November/December 1994 and set out in an appendix to my claim dated 27 June 1996 and submitted on 28 June.
17. Payment of a total of 60 hours' overtime as set out in the statement I submitted to [a named personnel officer] on 16 April 1996.
18. The cost of making photocopies."

C. In its reply the ILO declines to discuss what sort of appointment the complainant had since that issue was disposed of in his first complaint. But it objects to his speaking of "dismissal". It withdrew the offer of extension before he got notice of it; so the only material issue is whether it had a duty to extend his short-term appointment. The accompanying letter of 19 July 1995 made it plain that the contract he was being offered carried "no expectation of any longer term of employment" and would end "at the date of expiry, without notice, unless before that date an offer of renewal was made and accepted". All that was said again in the minute of 30 August 1995.

The secretary to the chief of APPL and the complainant's supervisors maintain that he did not tell them he would be off work on 20 and 21 December 1995. "The contract offered was to start at 1 January 1996 and at that date his whereabouts were unknown. That fact alone voided the offer ...". Knowing as he did what APPL's workload was and that there was "a good chance that his [request for extension] would be accepted", he behaved cavalierly.

The Tribunal is not, says the ILO, competent to entertain his claims relating to the competitions for posts in APPL: until the results are out the claims are premature and therefore irreceivable. In any event the flaws he pleads are "sheer humbug", and the defendant "utterly denies" what he says about the competition in LIBSYND.

The ILO will not pay him repatriation grant until, as the Staff Regulations require, he comes up with evidence to show that he is no longer living in the country where he was last stationed. His claim to compensation for overtime is out of time.

D. In his rejoinder the complainant submits that the initialling of the text of the offer by the chief of APPL on 3 January 1996 shows that his absence on 20 and 21 December 1995 was above board. The ILO has never been willing to treat the issue as the mere misunderstanding it really was. Besides, since he had already agreed to the extension, the offer signed by the Personnel Department and the initialling of it by the chief of APPL were all that the conclusion of the contract called for.

Although the result of the first competition in APPL was not out when he filed his complaint, what he feared came to pass: the staff member backed by the ILO got the post even though he did not have the degree in law required in the notice and the appointment of that staff member offended against the fair geographical distribution of staff.

As for the LIBSYND competition, the reason why there was a written examination was that there were three of the applicants whom the Selection Board could not rank. Since he came top in the test and the Director-General nevertheless picked the applicant who came last he presses his charge of unlawful pressure.

As to the repatriation grant, he says he offered a copy of the employment log-book he has in Brazil, where it amounts to proof of residence, but the ILO has never answered. His claim to payment of overtime was not out of time.

E. In its surrejoinder the Organization points out that the complainant cannot have accepted an offer it had not yet made. So there was of course no contract. His behaviour was "feckless" and "unseemly in someone looking for a job in the international civil service", and it wanted nothing more to do with him.

As to the competitions, his claims are irreceivable because they assume that a decision not yet taken may cause him injury. It is quite wrong to try to interfere in the outcome of a competition, and the Tribunal will not order the ILO to appoint one of the applicants. The outcome of one of the competitions in APPL was that the Director-General appointed a former colleague of the complainant's. In so deciding he took account of the complainant's behaviour as well as of objective assessment of the candidates. The one chosen did have the required degree. As for the competition in LIBSYND, written tests are just one method of assessment. Even though the Selection Board recommended the complainant, he was ineligible because he did not have the number of years of university education in law that the notice had stipulated.

F. At the Tribunal's request the ILO produced on 3 November 1997 the text of notice V/LIBSYND/14/95, the personal-history form submitted by the complainant with his application and the Selection Board's report .

G. The complainant observes that according to its report both the Selection Board and the Freedom of Association Branch found him eligible: he had "the required education and proficiency in languages". The purpose of the written test was, said the report, to rank the three best applicants. Though the complainant came first, the chief of LIBSYND stepped in, and the Board picked the candidate with the lowest score. What happened was that the chief heard the results of the test and so as to rescue that candidate, who was already in his branch, made new stipulations at odds with the notice. Requiring that French should be the appointee's "mother tongue" was an inadmissible form of discrimination.

In the complainant's submission, the ILO is taking a "pedantic" view of his qualifications. It is setting greater store by the duration than by the substance of education. It misled him for years by suggesting, for example in his performance reports, that he was "fit to win a competition".

It gave him only two-and-a-half days' notice - on 15 August 1995 - of the test, though the Board's report says that the decision to hold it had been taken on 6 June. The Tribunal does have competence to order the appointment of a particular candidate.

H. In its final brief the ILO repeats that the Selection Board never said that its choice would turn on the examination alone. The results showed that any one of the three candidates would do, and in making the choice it was only reasonable to consult the chief of LIBSYND. It is quite in keeping with the case law for an organisation to eliminate a candidate who is not fully qualified.

"The chief of APPL's use of the term 'mother tongue', though strictly mistaken, was intended in its usual connotation of 'command' of the language." But of course someone who, like the appointee, is a native French-speaker would know the language better than the complainant.

CONSIDERATIONS

1. The complainant joined the International Labour Office in 1988 and left it on 31 December 1995. As was said in Judgment 1666, on his first complaint, he held short-term contracts. At first they were intermittent, but from October 1993 onwards they were more regular. Under the last one, concluded in July 1995, his appointment was extended until 31 December 1995 and he came under Rule 3.5 of the Rules governing conditions of service of short-term officials, known as the "Short-term Rules". That Rule conferred on him some of the entitlements of the holder of a fixed-term appointment, but the other terms of his contract remained the same: in

particular it was to expire at the scheduled date without notice and carried no expectation of further employment.

Late in 1995 his supervisor, the chief of the Application of Standards Branch (APPL), told him he might get an extension of his short-term contract. The ILO agreed on or about 14 December to letting him have another three months, from 1 January to 31 March 1996. The Personnel Department drew up and signed the offer on 21 December. The chief of APPL initialled the text on 3 January 1996. Being unable to reach the complainant, the ILO left it in the office he had been using.

He obtained formal permission to take leave from 14 to 19 December 1995. Although according to the entry he had signed on his leave sheet he was to be at work on 20 and 21 December. He failed to turn up on those days. On 18 January 1996 he sent a fax to the chief of APPL to ask whether the ILO was extending his appointment. He gave no return address, just a fax number. The chief of APPL sent a reply to that number on 26 January 1996 to say that the Personnel Department would be answering soon. Another fax came from him dated 30 January. On 6 February the department sent him a letter at his address in Geneva to say that the ILO had dropped its offer of an extension; it had been trying to reach him since 15 December 1995 both in Geneva and at his mother's address in Brazil; it had been expecting him to report for duty on 20 December; and, having kept silent until 18 January 1996, he had left the Office in the dark.

The complainant's answer is that on 15 December 1995 he left Geneva for a holiday in Brazil. He was, he says, entitled to leave in compensation for overtime work. He talked about the matter with his supervisor and got his consent, even though there was no formal record of it; in keeping with the usual informal practice the leave was to be properly recorded later. The chief of APPL demurs. The ILO says it had someone telephone the complainant's mother in Brazil and ask that he get in touch at once. He says that it did nothing of the kind; it did not try very hard to reach him. Though he says that the Administration or at least some staff knew where to write to him in Geneva and São Paulo, and had his parents' address in São Paulo, he does not deny failing to tell the Office where it could reach him, in Geneva or in Brazil. Although it did not write to him at the time it did try to reach him by telephone, as indeed it managed to reach others in like circumstances.

2. On 27 June 1996 the complainant submitted a "complaint" to the Director-General claiming reinstatement and a new contract; appointment to one of three posts for which he had applied in competitions V/APPL/4/95, V/APPL/5/95 and V/LIBSYND/14/95; repatriation grant; and compensation for overtime.

He got no answer within the time limit of two months. A representative of the Director-General vouchsafed him a reply on 10 June 1997. The gist of it was:

> He had no right to any extension of his short-term appoint and, owing to his conduct while on leave, the ILO would no longer be offering him the extension that would have begun on 1 January 1996.
>
> The Director-General had authorised short-term staff to enter competitions. Being lodged before competitions for posts V/APPL/4/95 and V/APPL/5/95 were over, his "complaint" was premature. Though over, competition V/LIBSYND/14/95 showed no procedural flaws and there was no call to cancel the appointment made. The complainant's having to write in French rather than Spanish caused him no injury: Spanish was not his mother tongue either; he had a command of French; and French was more important for the post anyway.
>
> The ILO would pay him the repatriation grant as soon as he had proved residence in Brazil.
>
> His claim to compensation for overtime arose from work he had done at a meeting in 1994. It was rejected because by making it on 16 April 1996 he had missed the prescribed deadline. It was no longer possible to check his assertion and grant him compensatory leave. On the strength of the written records the ILO accepted his claim to compensation for overtime in 1995 but was docking the two days' leave he had taken without permission in December 1995.

3. His complaint impugns the implied rejection of his claims and is largely a recasting of his arguments. After getting the Director-General's reply, summed up in 2 above, he withdrew his claim to compensation for overtime in November and December 1995.

The ILO asks the Tribunal to dismiss his complaint on the merits insofar as it is receivable. It observes that he never got notice of the offer of extension. In any event it withdrew the offer before he accepted it; so there was no contract. His being a short-term appointment, the Organization had no duty to extend it. There was nothing wrong with its refusing an extension inasmuch as through his own fault he was unable to accept it, let alone report for duty, in time. The competitions for two posts in APPL were not over when he filed his internal "complaint" and, having suffered no injury, he showed no cause of action. For the reasons set out in 2 above the ILO says that the competition for the post in LIBSYND was beyond reproach. It does not rule out the repatriation grant altogether but says he must prove residence in another country, and he has not yet done so. As to overtime it stands by what it has already told him and adds that under Article 7.2 b) of the Staff Regulations the only sort of compensation he can get for overtime in 1994 is time off.

The ILO having raised in its surrejoinder new issues of fact and of law about the post in LIBSYND, the Tribunal invited comments from the complainant and a final brief thereon from the defendant.

4. The complaint was filed within the time limit set in Article VII(3) of the Tribunal's Statute for impugning an implied decision. The Tribunal takes up the other issues of receivability below.

Non-renewal

5. (a) The complainant argues that the parties concluded a contract on the same terms as were set out in the ILO's offer.

There will be no contract unless an offer is made and accepted, and both offer and acceptance take effect upon notification to the other party.

Here the ILO's offer was in law no more than an intention since it was never notified to the complainant himself nor sent to his address before being withdrawn. His former office was not the place for giving notice of it: his appointment had expired by the time it was left there and so the office was no longer his.

He is mistaken in pleading implied acceptance on the grounds that the ILO knew that he would agree to its offer. There could be no implied acceptance unless he had an offer, and none had been notified to him. Besides, tacit acceptance would not have done since the text required express acceptance in writing.

So the parties concluded no contract in January 1996.

(b) The complainant submits that he was entitled to a new contract on the grounds that the non-renewal was unlawful.

According to precedent non-renewal is a discretionary decision that may be set aside only if it is *ultra vires* or shows a formal or procedural flaw or a mistake of fact or law, or overlooks a material fact, or draws an obviously wrong inference from the evidence, or amounts to misuse of authority. Review by the Tribunal will be especially cautious in the case of a probationary appointment, the purpose of which is to let both sides see whether a longer one is desirable: see, for example, Judgment 1418 (*in re* Morier). Review will be cautious in the case of short-term appointments too, which are obviously not intended to make for long-lasting relations: see Judgment 1560 (*in re* Ndédi) under 4 and the precedents it cites. Yet the organisation may not act arbitrarily; it must bear in mind, among other things, the staff member's seniority, the quality of his work and its own real needs.

By those lights there was nothing wrong with the ILO's intention of extending the complainant's appointment. But difficulties then arose. For one thing, it could not reach him to get his formal acceptance of its offer of the extension from 1 January to 31 March 1996. Worse, he failed to provide the services it required of him from 1 or 2 January 1996 since it had no word of him until the 18th. The behaviour of someone who, far from apologising, levelled criticism raised doubts about his fitness to work for the Organization.

He says that the ILO might have written to him in Geneva or São Paulo and he might then have answered soon enough. But it is not at all sure that that would have done since the extension was to start on 1 January 1996 and the Office was shut from 22 December 1995 until that date. So the ILO's wish to get in direct touch with him is understandable. Some senior officers were expecting to do so on 20 or 21 December. That, he says, was a misunderstanding since he had said he would be absent until the new year. But the entry in his leave sheet suggested nothing of the kind and he ought to have taken care not to create such confusion.

The conclusion is that it was a proper exercise of discretion by the Director-General or management to decide thereupon to withdraw the offer.

(c) The complainant's other pleas are immaterial.

Non-renewal was not in his case a hidden form of disciplinary action; so the rules on such action do not apply.

The impugned decision was properly substantiated.

There was no breach of his right to a hearing: he had the opportunity of stating his case without hindrance before the decision he is challenging could be inferred.

(d) He argues that failing the renewal of his appointment he should be granted priority in the filling of any future vacancy.

Under Article II6(a) of its Statute the Tribunal may entertain a complaint from a former official that arises from his status as such. If it does not so arise, the Tribunal will not entertain it. The complainant fails to show how someone who has had no extension of appointment may be entitled to a new appointment later on. There is no need to determine whether such a right may arise under special circumstances, for example where the refusal of extension was attributable to some short-lived problem: in general there is no such entitlement. The complainant must bear the consequences of his own behaviour and may not rely on any exceptional entitlement.

The competitions

6. The complainant objects to the procedure followed in three competitions he entered.

The ILO having opened the competitions to the complainant and other such holders of short-term contracts, the Tribunal may, under Article II6(a) of the Statute, entertain objections from them, even if they have since left the Organization's employ.

(a) Since a complainant must first exhaust his internal remedies the Tribunal will entertain objections only to the Organization's final decision, be it express or implied.

For the two posts in APPL the process of selection was not completed and no appointment had been made when the complainant raised his objections. Having suffered no injury on that account, he had no cause of action and his complaint is irreceivable under that head.

(b) But for the third post, in LIBSYND, the process of selection was completed and an appointment made by the time the complainant raised his objections.

(i) The ILO says for the first time in its surrejoinder that the reason why the complainant could not be appointed to the post was that he lacked one of the basic requirements stated in the notice of vacancy, namely, a minimum of five years' university education in law. The text of his personal-history form shows that he was not qualified on that score, and the Selection Board said so in its report.

On the evidence that fact is proven.

According to the case law on appointment made after a competition will be fatally flawed if the successful candidate fails to meet any of the essential requirements set out in the notice of the competition: see Judgments 1158 (*in re* Vianney), 1223 (*in re* Kirstetter No. 2), 1497 (*in re* Flores) and 1646 (*in re* Pinto). Since the complainant did not qualify, he could not have been appointed and, if he had been, the other candidates would have been entitled to seek the quashing of his appointment.

It was no doubt odd and regrettable that the ILO had him take the same tests as the best candidates. That is not a matter for which the other candidates may be held to account, and no reason for relieving the Organization of applying the rules of the competition.

The complainant submits that the requirement of five years' university education in law is unreasonable since the University of Geneva, where he studied law, and other universities let someone take the course in three years: so the requirement favours the least gifted or laziest students. Though well taken, the point does not make the requirement invalid.

In any event his objections cannot be sustained.

(ii) In his final submissions the complainant sees a breach in the rules on competitions in that, whereas the notice required mere proficiency in French, the Organization later went further and required that French should be the mother tongue.

To lay down a further requirement that is not in the notice may indeed amount to breach of procedure. But there was no such breach: the ILO did not make a native grasp of French an essential requirement. In appointing someone whose mother tongue was French to a post that called for a command of that language it demanded no more than the notice had required, namely a "command of French".

(iii) The complainant sees another procedural flaw in the fact that the three top candidates had to take a written test in French that was not provided for in the notice. That, he submits, put him at a disadvantage because French was the mother tongue of the two other candidates. His own is Portuguese, and he would rather have drafted in his second language, Spanish.

The ILO's answer is that it wanted someone whose language was French and that the test caused him no injury because his French is very good.

The Selection Board's report bears that out. His grasp of French is sound because he has lived for years in Geneva and there obtained his main education in law. Besides, he came first in the written test; so having to write in French put him at no disadvantage. The ILO was looking for someone to work mainly in French; so it was right for the Selection Board to examine proficiency in that language.

(iv) The complainant suspects that the Selection Board committed a breach of procedure by giving in to undue outside pressure to reject him, having been told that, if he won the competition, the post would be "frozen" and no appointment made.

The Selection Board's report, though detailed, reveals no such interference. The majority put the successful candidate top on the strength of formal qualifications, just ahead of the complainant, though one member ranked him first. In the written test he came first. But what proved decisive was the opinion of the chief of LIBSYND, who said his branch needed someone with perfect French and very good English and, if possible, a grasp of English law. After deliberations that took three sittings the Board agreed and unanimously recommended, with the consent of the chief of LIBSYND, someone equally at home in English and in French.

The complainant has not adduced a shred of evidence of the interference he alleges. So the Tribunal will order no further submissions and will reject the plea: see Judgment 1436 (*in re* Sala No. 2) under 6.

The complainant is under the mistaken impression that the Selection Board and the Director-General were bound by the results of the written tests. Paragraph 12(e) of Annex I to the Staff Regulations, on the filling of posts by competition, says:

> "the selection will be made after the remaining candidates have been interviewed or tested or both, where desirable, and after the chief concerned has been consulted."

Such consultation, which is compulsory, serves to identify what the Organization needs. So the Selection Board did not go beyond its terms of reference in consulting the chief of the Branch and giving his opinion due weight.

The criteria that the Board and the Director-General applied are plainly in keeping with the Organization's requirements and suggest no misuse of authority.

(v) The complainant submits that the Organization failed to give him notice of the outcome of the competition and thereby acted in breach of paragraph 23 of circular 246 in series 6, which says:

> "A register will be kept of officials placed second and third in competitions who shall be so informed. Other candidates not selected shall be informed."

Paragraph 20 of Annex I to circular 209 in series 6 further stipulates that "The results of a competition shall be publicly announced".

Since the complainant's plea has no bearing on the lawfulness of the appointment there is no need to determine whether the complainant was given proper notice of the outcome. His plea fails.

The claim to repatriation grant

7. Article 11.15(c) of the Staff Regulations reads:

> "The payment of the [repatriation] grant shall be subject to the provision by the former official of documentary evidence satisfactory to the Director-General that the official has taken up residence in a country other than that of the last duty station."

What is at issue under this head is proof of his taking up residence in Brazil.

He says that no residence papers are officially issued in Brazil, but he offered the ILO a copy of his employment log-book. The ILO takes the view that he has failed to supply the evidence required.

Here again there is nothing wrong with the impugned decision. The complainant may avail himself of the possibilities open to him under Brazilian law for proving residence. He may in particular offer evidence to show place of residence and employment status and how long he has been living and working in Brazil. He may thereby dispel any doubts the ILO may have on that score.

The conclusion is that at the time when the ILO provisionally rejected his claim its refusal was not unwarranted.

Overtime

8. (a) His claim to compensation for overtime in 1995 discloses no cause of action, the ILO having allowed it.

(b) In his internal "complaint" he cited a statement he had submitted to the ILO on 16 April 1996 about overtime he had done in 1994. It said:

> "Over and above [overtime in 1995] please add the overtime I did for the Tripartite Meeting on Maritime Labour Standards (28.11.94 to 9.12.94) as shown on the sheet of which I attach a copy. I submitted the original just after the last sitting. I got no leave in compensation and, having left, may no longer get any."

The representative of the Director-General answered:

> "As for your claim to compensation for overtime at the meeting in 1994, you took until 16 April 1996, or over a year to submit the form; so the Director-General considers that the Office need not entertain your claim."

There followed a passage about time limits, the purport of it being that, to succeed, his claim to compensation ought to have been made forthwith.

In his complaint he again says that the ILO neglected his claim even though he supplied his overtime sheet at the end of the meeting and brought the matter to the attention of the people in charge, including his supervisor, who was not in favour of compensation. The Office never let him have an answer.

In its reply the ILO says no more than that it "did not see his overtime sheet until 16 April 1996" and that his claim was "plainly time-barred and unacceptable".

In his rejoinder he presses the matter. He says that just after the meeting he handed the sheet

> "to [the official] in charge of overtime, who told me that it had gone to [the chief of APPL]. In my minute of 25 July 1995 I asked [the chief] to grant me compensatory leave, but [he] refused ... I sent [the sheet] to [the official in charge], who recently confirmed that it went to [the chief of APPL], who refused on 25 July 1995 ... it is not true that I waited until 16 April 1996 ... What I did at that date was provide a copy."

So the matters at issue are whether he submitted an overtime sheet in 1994 and, if so, what became of it. Though the ILO has not said anything much of substance on his allegations, it has a duty to check what he says and give him a new decision. To that extent his complaint succeeds.

DECISION

For the above reasons,

1. The impugned decision is set aside insofar as it relates to the complainant's claim to compensation for overtime in 1994, the case being sent back to the Organization for review and a new decision.
2. The ILO shall pay him 500 Swiss francs towards costs.
3. His other claims are dismissed.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

MICHEL GENTOT JULIO BARBERIS JEAN-FRANÇOIS EGLI

A.B. GARDNER

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FOURTH SESSION

***In re* Moran** **Judgment 1688**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Stephen Anthony Moran against the European Patent Organisation (EPO) on 6 February 1997 and corrected on 18 March, the EPO's reply of 6 June, the complainant's rejoinder of 11 July and the Organisation's surrejoinder of 18 September 1997;

Considering Articles II, paragraph 5, and VII of the Statute of Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who is British and was born 1956, joined the staff of the EPO on 1 April 1982 as a clerk at grade B2. On 1 February 1989 he was promoted to B3. He is employed at Directorate-General 5 (DG5) of the European Patent Office, the secretariat of the EPO.

On 24 January 1994 he had a talk with his reporting officer about his staff report for the period from 1 July 1992 to 31 December 1993. The report was signed neither by the reporting officer nor by the countersigning officer, the Vice-President in charge of DG5. It assessed as "very good" the "quality" of his work, his "productivity", "aptitudes", "dealings with others" and "attitude to work". His "overall rating", too, was "very good". His two previous staff reports had given him the same general rating.

The text that the reporting officer eventually signed on 23 February 1994 and the Vice-President on 21 March assessed him as only "good" under each of the headings mentioned above. On 29 July he said he was challenging the report. On 3 November 1994 the reporting officers refused to change it and he applied for "conciliation" in accordance with section D of the General Guidelines on Reporting. On the conclusion of that procedure the President of the Office decided, on 24 February 1995, to confirm the report.

On 24 May the complainant filed an internal appeal against that decision. By a letter of 21 June 1995 he was told that the President had rejected his appeal and put it to the Appeals Committee. In its report of 4 November 1996 the Committee recommended by a majority that the President reject his appeal. By a letter of 19 November 1996 the Director of Staff Policy told him that the President had followed the Committee's recommendation, and that is the decision now under challenge.

B. The complainant contends that the countersigning officer asked the reporting officer to alter the original text and give him only a "good" rating on the grounds that "very good" ones were being handed out to too many staff in DG5. That is tantamount to having quotas for different ratings. The pressure put on the reporting officer is contrary to the terms of a circular, No. 188, which determines the duties of the reporting and countersigning officers. The circular calls for an interview before the staff report is drafted and the interview must be in good faith. It was a fatal procedural flaw for the reporting officer not to interview him after altering the report. Any alteration must be discussed with everyone concerned, and first and foremost with the official himself.

The complainant asks the Tribunal to order the EPO to change his assessment for the period in question from "good" to "very good" and to grant him any redress it sees fit.

C. In its reply the EPO contends that the claim to redress is irreceivable on the grounds that the complainant failed to put it to the Appeals Committee.

On the merits it submits that the complainant has failed to show that the countersigning officer put any pressure on the reporting officer to change the report. In fact the reporting officer merely changed his mind and altered the text accordingly. The defendant says that the Office sets no quota for "very good" ratings. It is the comparison of staff in the reporting procedure that explains why someone, like the complainant, whose performance has not declined may get a different rating in successive periods. In the previous reporting period another reporting officer rated him "very good". There is nothing in the General Guidelines on Reporting that requires a further interview when the reporting officer changes his mind. The complainant's charge of breach of good faith does not rest on any valid plea. The reporting procedure shows no fatal flaw.

The Organisation concedes that it would have been preferable not to let the complainant see a draft of the report which might lead him to expect a higher assessment than the one he eventually got. But since he was no raw recruit he cannot make out that he believed the original draft to be the final text.

D. In his rejoinder the complainant observes that he is seeking redress for the injury that he sustained on account of the President's final decision of 19 November 1996. That claim is subsequent to the filing of his internal appeal and so could not have been made in that appeal.

On the merits he repeats that the countersigning officer put wrongful pressure on the reporting officer. He not only maintained but actually improved the quality of his performance. For want of any text that required a further interview, good faith did so. His previous supervisors always called him in to see the final text of the staff report and discussed the final assessment. His new reporting officer misled him over the text he saw at the interview on 24 January 1994.

E. In its surrejoinder the defendant presses its objections to the receivability of the complainant's claim to redress. The President's final decision merely upheld the challenged staff report and it is hard to see how that decision could have caused him any damage distinct from such as he attributes to the report itself.

The EPO presses its pleas on the merits. It regrets that some reporting officers do show staff members at the interview the final signed texts of reports. In any event the complainant may not rely on such practice. He has failed to offer any evidence to show that his performance had improved. According to section C of the General Guidelines on Reporting one of the countersigning officer's duties is to ensure consistency in applying them. In this case, therefore, he did not abuse his authority in raising the matter with the reporting officer.

CONSIDERATIONS

1. This complaint against the European Patent Organisation is about a report on the complainant's performance from 1 July 1992 to 31 December 1993.

Article 47 of the Service Regulations reads:

> "The ability, efficiency and conduct in the service of each permanent employee ... shall be the subject of a report made at least once every two years under the conditions established by the President of the Office."

Those conditions are laid down in the "General Guidelines on Reporting".

2. According to the General Guidelines the reporting officer must have a "prior interview" with the official he is to report on. In this case the interview took place on 24 January 1994. The complainant says that in the course of the interview his reporting officer showed him the text of a draft report with which he agreed. But, he says, when he got the text duly signed and countersigned he found that it was not the same; some ratings had been changed from "very good" to "good". The reporting officer had signed the report on 23 February 1994 and the countersigning officer on 21 March. On 29 July the complainant protested. On 3 November 1994 the reporting and countersigning officers confirmed their ratings after the former had spoken to him.

The complainant filed an internal appeal. The final decision rejecting it was taken on 19 November 1996.

3. In this complaint, which he filed on 6 February 1997, he claims the amendment of the report and an award of moral damages.

4. He pleads the following procedural flaws in the report:

(a) The reporting officer changed her original assessment under pressure from the countersigning officer, who should instead have allowed the reporting officer to make her comments and then recorded her own disagreement.

(b) The second flaw was the reporting officer's failure to interview the complainant in good faith. Since their interview of 24 January 1994 was not in good faith there should have been another.

(c) A third flaw is evident from the Administration's reply of 10 June 1996 to his internal appeal. The English version states that a reporting officer may change his report "after discussion with all other parties involved". Though the complainant was one such party he was not consulted.

5. The Tribunal has already made many rulings on staff reports of EPO employees. Firm precedent has it that issues raised by such reports are discretionary and the Tribunal will set aside or amend a report only if there is a formal or procedural flaw, a mistake of fact or law, or neglect of some material fact, or misuse of authority, or an obviously wrong inference from the evidence. Those criteria are the more stringent because the EPO has a procedure for conciliation on staff reports and the Service Regulations entitle officials to appeal to a joint body whose members are directly familiar with the workings of the Office.

6. The criteria are too narrow to allow the Tribunal to entertain the argument that the complainant founds on assessments of him in earlier staff reports.

7. Before taking up his pleas about procedural flaws it is worth observing that at various points in his submissions he seems to be under the mistaken impression that he got two staff reports: one at the time of the interview and another signed by the reporting officers. In fact there was a single report, the duly signed text.

8. As to the first of the three procedural errors he alleges, there is no evidence before the Tribunal to support his charge that the reporting officer gave in to pressure from the countersigning officer. Likewise, he offers not a shred of evidence of the second error, breach of good faith. Besides, the lack of a second interview does not denote bad faith. There is no rule in the "General Guidelines on Reporting" that requires the reporting officer to carry out more than one interview with a staff member.

As for the EPO's reply of 10 June 1996 to his internal appeal, the signed original was, as he himself acknowledges, in French. It read:

> "Lors de l'entretien préalable, le projet de rapport n'est pas encore finalisé car l'entretien a lieu lors de la phase de la procédure au cours de laquelle le formulaire est établi. Le premier notateur a donc encore la possibilité d'y apporter des modifications, après des entretiens avec l'ensemble des personnes concernées."

Whatever the authority of the English translation, the words "l'ensemble des personnes concernées" denote the reporting officers, not the employee.

9. According to a fundamental principle of procedure the Tribunal's ruling depends on proof of the parties' submissions. The complainant having failed to adduce any evidence to bear out his pleas, his main claim fails.

10. That being so, his claim to moral damages cannot succeed either.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

MICHEL GENTOT JULIO BARBERIS JEAN-FRANÇOIS EGLI

A.B. GARDNER

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-FOURTH SESSION

***In re* Montenez (No. 2)** **Judgment 1689**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Philippe Montenez against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 20 December 1996, Eurocontrol's reply of 21 March 1997, the complainant's rejoinder of 1 June and the Organisation's surrejoinder of 29 August 1997;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Belgian who was born in 1944, joined the staff of Eurocontrol at headquarters in Brussels on 1 October 1985 as a translator at grade LA6. On 1 January 1992 he was promoted to grade LA5. From 16 March 1994 to 15 February 1995 he was acting head of the French Language Translation Unit of the Linguistic Division.

On 26 April 1995 Eurocontrol published a notice of competition, No. HQ-95-LA/097, for the post of head of Unit at grade LA4. It said that applicants had to be of French mother tongue or have received their education in French, and have "sound knowledge of English, German and at least one other of the languages used in the Agency". There was to be a preliminary selection, based on assessment of the applicants' academic and other qualifications, and then a final selection from the short list to be made on the strength of further assessment and of interviews.

The complainant applied on 20 June. So did Mrs. Brigitte Vaury, an interpreter at grade LA5. Mrs. Vaury had been with the Agency since

5 October 1970 and in 1988 had been appointed deputy to the head of the Unit. She had been the acting head since 1 April 1995.

On 22 August 1995 the Selection Board decided that the complainant and Mrs. Vaury were the only candidates to qualify and it ranked them on a par. By a letter of 1 September an officer of the Human Resources Directorate asked the complainant to report on 15 September for what he called a "personal development exercise", which was to consist of an interview with a firm of recruitment consultants. Mrs. Vaury too was asked to attend such an interview. On 17 November an ad hoc promotion board, chaired by the Director General and made up of three members of the Administration and two staff representatives, recommended Mrs. Vaury for the post. By a letter of 28 November an official of the Human Resources Directorate told the complainant on the Director General's behalf that his application had been unsuccessful. By a memorandum of 15 December 1995 the Director of the General Secretariat informed the staff of the Linguistic Division that Mrs. Vaury had been appointed head of the Unit as from 1 December 1995.

On 29 February 1996 the complainant submitted a "complaint" to the Director General under Article 92(2) of the Staff Regulations against the rejection of his application and the appointment of Mrs. Vaury. The case went to the Joint Committee for Disputes. In its report of 31 July 1996 the Committee said that the "complaint" was warranted because the appointed candidate had neither "a degree in German" nor "knowledge of the level usually required for the duties [of the post], particularly revising translations". In a letter of 23 September 1996 to the complainant - the impugned decision - the Director General rejected the Committee's recommendation.

B. The complainant submits that the process of selection was flawed. It was unlawful to put the matter of selection in the hands of a private firm at a final stage from which the Selection Board was excluded. The provisions which the Agency relied on to hold the "psychological tests and interviews" are in office notice 25/94 and Articles 6 and 7 of Rule of Application No. 2 on the "selection test procedure". Those provisions are at odds with Article 30(2) of the Staff Regulations, which says that the Director General chooses from a list of suitable candidates submitted by the Selection Board. The complainant also cites Article 30(1), which makes the Selection Board competent for the whole process. So it was unlawful to bring in a sort of ad hoc promotion board. What is more, the promotion board was not independent because the Director General chaired it.

There were several breaches of Rule No. 2. For one thing, the notice failed to say what sort of competition it would be – on the strength of paper qualifications alone or of examinations as well. For another, as the Joint Committee for Disputes observed, the Selection Board gave no explanation of the choice of candidates it put to the Director General.

Mrs. Vaury has neither a degree in German nor enough practical knowledge to make up. So she did not even qualify: the notice declared "sound knowledge" of German to be "an essential requirement". The Selection Board made an obvious error of judgment in putting her technical qualifications on a par with the complainant's. The Director General made another in founding his decision of 23 September 1996 on assessment of the complainant's ability to head a team.

The complainant seeks the quashing of the decisions rejecting his application for post HQ-95-LA/097 and appointing Mrs. Vaury. He claims costs.

C. In its reply the Organisation submits that Rule No. 2, office notice 25/94 and notice HQ-95-LA/097 are not a whit inconsistent with Article 30 of the Staff Regulations. The "personal development exercise" was not a test of the candidates' professional skills but just a means of helping the Director General to choose between two candidates whom the ad hoc promotion board had put on a par. Since the two internal candidates were competing for promotion, Article 45 of the Regulations and Rule No. 4 on the promotion procedure also applied. In any event the complainant may not object to bringing in the promotion board, since it afforded a further safeguard in the process of selection. Its membership was in line with Article 5 of Rule No. 4.

There was no breach of Rule No. 2. The notice said that the competition would be based on qualifications, and the complainant knew full well that short-listed candidates for any management job had to undergo a "personal development exercise". There was no need for the Selection Board to explain its choice since according to the criteria in the notice it had put the two candidates on a par.

Mrs. Vaury does have a diploma in German. Her performance reports show that she has always had to work in German and Spanish. The Selection Board did not err in finding both candidates suitable. According to the case law the Director General has wide discretion in such matters and properly took the view that Mrs. Vaury would make a better leader and manager.

Eurocontrol appended to its reply observations which the Tribunal invited from her. She challenges the finding of the Joint Committee for Disputes and objects to its methods. She produces copies of a diploma she has in German and of several of her performance reports.

Eurocontrol asks that full costs be awarded against the complainant.

D. In his rejoinder the complainant maintains that the "personal development exercise" did amount to a test of suitability for the post. The Director General is supposed to make his choice only on the strength of a "reasoned report" which, according to Article 6 of Rule No. 2, the Selection Board must submit to him together with the list of suitable candidates. Citing the case law of the Court of Justice of the European Communities, the complainant argues that such "reasoned" report is a substantive requirement and that the lack of one will adversely affect an unsuccessful candidate. The diploma in German produced by Mrs. Vaury is not a university qualification. Besides, her performance reports rate her only "good" for knowledge of German and Spanish. Seldom has she had to render German into French.

E. In its surrejoinder the Organisation contends that it caused the complainant no injury by convening the ad hoc promotion board. He himself has no university degree in English. Insofar as he is objecting to the lawfulness of notice HQ-95-LA/097 he should have challenged it in time, but he did not.

CONSIDERATIONS

1. The complainant, a Belgian born on 24 March 1944, has been with Eurocontrol since 1 October 1985. He holds grade LA5.

On 26 April 1995 the Agency issued a notice of competition for the grade LA4 post of head of the French Language Translation Unit in the Linguistic Division. The competition was open to internal and external candidates. The notice declared English and French to be the main working languages, described the duties and called for the following qualifications:

"- University degree or equivalent professional experience.
- Eurocontrol staff must be able to work in a team with persons of other nationalities.
- Age limits: External applicants must be between 40 and 50 years of age.

> - At least 10 years' experience of translating and revising work in the legal, technical and administrative fields.
> - French mother tongue or language of education.
> - Sound knowledge of English, German and at least one other of the languages used in the Agency is an essential requirement.
> - Experience of working in a major multicultural international organisation would be an important asset.
> - Experience of managing staff.
> - Ability to maintain harmonious working relations.
> - Familiarity with Word6/Windows would constitute an advantage."

As to procedure the notice said:

> "SELECTION
>
> An initial selection will be made on the basis of a first assessment of qualifications and experience of all candidates. Thereafter, those candidates considered suitable may be invited to take part in a final selection procedure consisting of assessments and interviews. Further details will be given to candidates who are invited to participate."

The complainant applied.

On 22 August 1995 a Selection Board met to consider the candidates. It found only two internal ones suitable, the complainant and Mrs. Brigitte Vaury, who was also in the Unit, and it ranked them *ex aequo*.

On 1 September 1995 Eurocontrol invited the complainant to report on 15 September to a firm of consultants known as Acker-Deboeck for a "personal development exercise". He went, the firm made a report, and they let him comment.

Since the grade of both internal candidates - LA5 - was lower than that of the post they had applied for - LA4 - an ad hoc promotion board met on 17 November. It recommended Mrs. Vaury. The Director General agreed and on 11 December 1995 appointed her as from 1 December 1995 with promotion to LA4.

The Administration told the complainant on 28 November 1995 that he had not been successful.

On 29 February 1996 he lodged an internal "complaint" with the Director General challenging the appointment of Mrs. Vaury and claiming the post for himself. The matter went to the Joint Committee for Disputes. The majority recommended allowing his "case" on the grounds that Mrs. Vaury did not have a degree in German or know the language well enough and that the Selection Board had failed to explain the ranking of candidates. The Director General nevertheless rejected his claims.

2. The complainant is impugning that decision. He wants the Tribunal to quash it together with the appointment of Mrs. Vaury and to appoint him instead. His pleas are set out below.

Eurocontrol asks the Tribunal to dismiss the complaint as devoid of merit.

By implication Mrs. Vaury wants the Tribunal to dismiss the complaint. She says that contrary to what the Committee found, she has a diploma in German and knows the language.

3. According to a long line of precedent the executive head of an organisation has broad discretion in making appointments, and his decision is subject only to limited review. The Tribunal will interfere only if the decision was taken *ultra vires* or shows a formal or procedural flaw or mistake of fact or law, or if some material fact was overlooked, or if there was misuse of authority or an obviously wrong inference from the evidence. See for example Judgments 1436 (*in re* Sala No. 2), 1497 (*in re* Flores), 1654 (*in re* van der Laan Nos. 1 and 2) and the other judgments cited therein.

That is the narrow context in which the Tribunal will take up the complainant's objections.

4. (a) His first plea is a procedural flaw, the inferior rule being, in his view, at odds with the Staff Regulations. In his submission it is against Article 30 of the Regulations to consider candidates at two stages: assessment of technical qualifications by a selection board, and then recommendations by a promotion board to the Director General. That is to confer the competence of the selection board on the promotion board.

Eurocontrol demurs. It says it always has to consult a promotion board when internal candidates are competing for promotion. In this case appointing either candidate meant promotion from LA5 to LA4 and there is nothing in Article 30 to bar application of that rule when promotion is the outcome of a competition.

Article 30(2) reads:

> "For each competition, a selection board shall be appointed by the Director General. This Board shall draw up a list of suitable candidates, in order of merit and without distinction of nationality.
>
> The appointing authority shall decide which of these candidates to appoint to the vacant posts.

> In the event of a selection being made which is not in conformity with the list drawn up by the selection board, reasons for the appointment shall be given in consequence."

Chapter 3 of Title III of the Regulations is about reports, advancement in step and promotion. Article 45(2) of that chapter reads:

> "An official may be transferred from one service to another or promoted from one category to another only on the basis of a competition."

Rule No. 4, which is about the "procedure for grade promotion provided for in Article 45(1) of the Staff Regulations", stipulates under 3 that "promotion lists shall be finalised by the Director General on the proposal of the competent Promotion Board" and provides under 4 for two promotion boards, of which the first has competence for promotion to LA4.

Those provisions square with Article 30. The job of a selection board is to draw up a list of qualified internal and external candidates so as to keep the procedure impartial and help the Director General. It need not make any recommendation. But appointment to a post at a higher grade is promotion, and so Article 45 applies. The promotion board too is supposed to help the appointing authority by making proposals for promotion on the strength of comprehensive assessment.

The complainant is misreading the precedents he cites. Judgments 1223 (*in re* Kirstetter No. 2) and 1359 (*in re* Cassaignau No. 4) are about the need for a selection board to give effect to the requirements of Article 30. They are not about the need for the promotion board nor about Article 45 and the implementing rule. In Judgment 1477 (*in re* Nacer-Cherif), a case in which another organisation was the defendant, the Tribunal found that there were two stages of selection: first, a panel drew up a list of candidates according to their merit on paper; then the list went to a selection board. The Tribunal held that the selection board was bound by its terms of reference and not free to delegate any of its responsibility to a selection panel, even though there is no general rule against such division of authority.

(b) In support of his first plea the complainant alleges breach of Article 30: the Selection Board failed to examine the "assessments and interviews" and so overlooked a material fact in rating the candidates.

The Agency replies that the qualifications the Board must assess according to Article 30(2) are the candidates' merits on paper and, if need be, as revealed in tests of their technical skills. But – says Eurocontrol – it is up to the promotion board and then to the Director General to assess temperamental fitness for management.

Its plea stands to reason. So the promotion board did not in this case encroach on the Selection Board's competence.

(c) The complainant sees a further breach of Article 30 in the fact that the Selection Board delegated the task of interviewing the candidates to a private firm of consultants.

It is true – as Judgment 1477, for one, affirmed – that, unless so empowered by a written text, a body may not delegate authority or competence. Yet here the material rules did not actually require the Selection Board to interview candidates itself. So it was free to get expert help in framing questions of a sort that only candidates with particular qualifications could answer, even though it still had to assess their answers itself and make recommendations accordingly.

(d) The complainant pleads that the Director General was not free to go beyond the Selection Board's short list and to heed further information obtained in tests or interviews.

Since there was nothing wrong with splitting up the process of assessment, there was no objection either to following up the rating of candidates' technical skills with whatever psychological tests the Organisation's interests demanded.

The complainant's first plea fails.

5. His second one is that the membership of the promotion board, which included the Director General, offended against Article 30 and the requirement of independence of the Administration.

As has been said, there was no breach of Article 30 in bringing the promotion board into the process of selection. It is not the same body as the Selection Board, and the same rules do not apply to both of them. Nor are the promotion board and the Director General one and the same: they may have different views even if the Director General himself is on the board. The board is supposed to contribute to the impartiality and openness of the promotion procedure and it does.

The second plea fails too.

6. Thirdly, the complainant pleads a procedural flaw, namely breach of Article 2(1)(a) of Rule No. 2, in that the notice failed to say what sort of

competition was intended: was it one that assessed paper qualifications only or one that involved tests as well?

The provision does require that a notice should state what the competition is to be based on and set out the process of selection. There are two reasons for that. One is that the process must be explicit enough to be binding on the appointing authority; the other is that people need the information to help in deciding whether to apply and to know what to anticipate.

Here the notice said that the process of selection would start with comparison of the candidates' paper qualifications and of experience but the "final selection" would depend on "assessments and interviews". Do such "assessments and interviews" amount to, or include, "tests"? The staff of Eurocontrol knew the answer from reading office notice 25/94 of 8 December 1994, which, among other things, set out two stages: first the Selection Board would look at the candidates' records and draw up a short list; then everyone on the list would –

> "be assessed by means of interviews, which may include tests, and/or other assessment procedures. A recommendation of the most suitable candidate(s) will be made by the service concerned to the appointing authority."

So the Agency was obviously basing the competition on qualifications, and the complainant could and should have realised as much. And if he was really unsure on that score he had only to ask the Administration. Since he did not do so, presumably he did not need to, and for him to raise the issue now scarcely shows good faith.

His third plea cannot succeed either.

7. Fourthly, he charges the Agency with breach of its duty under Article 2(2) of Rule No. 2 to tell him that he was to be assessed on the strength of "qualifications and tests".

Article 2(2) says that "Where the competition is on the basis of qualifications and tests, the candidates admitted to the competition shall be informed of the nature of the tests".

But it does not apply here: for the reasons just given the competition was to be on the strength, not of "qualifications and tests", but just of "qualifications". Besides, the Agency did give the complainant due notice of the psychological tests he was to take and offered him any information he needed.

So the comment in the last-but-one sentence of 6 above is again apposite.

The fourth plea is devoid of merit.

8. The complainant cites the report of the Joint Committee for Disputes in support of his further plea that the Director General ought not to have taken the Selection Board's short list because there was not the "reasoned report" which Article 6, paragraph 5, of Rule No. 2 required the Board to submit along with its list.

The Agency replies that that provision must be "construed in, and adapted to, the context of each case": where candidates are found suitable and put on a par no explanation is called for, though "a reasoned report would have made sense had the Board put the two candidates in order of preference".

The plea is unsound. It postulates that the complainant was unaffected by the finding that he was as fit for the post as the other candidate, and in any event it overlooks the fact that candidates are in competition. One who is ranked first will have no grounds for objection, but if two are ranked *ex aequo* each may have an interest in contending that the other should have been marked lower, or not put on the short list at all. The "reasoned report" required in Article 6 of Rule No. 2 serves the two purposes of helping the Director General take a decision and of allowing review of it. And as to review, it also answers the requirement of Article 30(2) of the Staff Regulations:

> "In the event of a selection being made which is not in conformity with the list drawn up by the selection board, reasons for the appointment shall be given in consequence."

So if the Director General endorses the Board's recommendations, the reasoned report required of it becomes decisive; whereas if he does not he must give reasons of his own. In any event the final ranking, whether by the Board or by the Director General, must be accounted for. If the Director General follows the Board's rating of the candidates' technical qualifications he need not say why; so the Board at least must say what its reasons are for the rating.

What sort of reasons should be given will turn on the nature of the procedure and the stage it has reached. According to precedent the form in which they are conveyed must not be such as to harm the prospects of unsuccessful candidates, especially internal ones: see Judgments 1233 (*in re* Kirstetter No. 2) under 35 and 1390 (*in re* More) under 26. Likewise, only where a *prima facie* case has been made out for quashing an appointment should there be access to a candidate's personal records: see Judgment 1436 under 6. Again, all that may be expected of the Selection Board is enough explanation for its choice to make sense, though a fuller one may be in order when it puts short-listed candidates on a par or in an order of preference. Ranking two or more *ex aequo* posits a finding that they are on a par; but they may be either equal in all respects or else, despite different qualities in different areas, rated broadly equal: the Director-General and the complainant need to know which.

In this case the Selection Board did not comply with the requirement. Nor did Eurocontrol later remove the flaw. Although the reasons stated for the impugned decision are sufficient and though the complainant's other objections to it fail, it does show a fatal flaw. An organisation that sets up an advisory body and has a duty to consult it must abide by its own rules and keep to the prescribed procedure: see Judgments 1488 (*in re* Schorsack), under 9 to 11; 1525 (*in re* Bardi Cevallos), under 3, and the judgments cited therein.

The plea is allowed.

9. The Tribunal will not take up the complainant's further pleas of fatal flaws in the impugned decision. The Director General will reconsider the case in the light of the reasoned report which the Selection Board must submit to him.

10. The Agency shall resume the process of selection at the point at which the flaw occurred. The Selection Board shall make the reasoned report required under Article 6 of Rule No. 2 and the process shall then go ahead as prescribed. But since the psychological tests are quite irrelevant to the Board's assessment of technical qualifications they need not be repeated.

11. Having succeeded in part, the complainant is entitled to costs.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The case is sent back so that Eurocontrol may follow the procedure set out under 10.
3. The Agency shall pay the complainant 50,000 Belgian francs in costs.
4. His other claims are dismissed.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

MICHEL GENTOT JULIO BARBERIS JEAN-FRANÇOIS EGLI

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FOURTH SESSION

***In re* Burri** **Judgment 1690**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Rosalind Burri against the Universal Postal Union (UPU) on 10 March 1997 and corrected on 10 April, the UPU's reply of 16 May, the complainant's rejoinder of 16 June and the Organisation's surrejoinder of 18 July 1997;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who was born in 1963, is a citizen of both Colombia and Switzerland. She joined the staff of the International Bureau of the UPU on 1 February 1996 as a technical assistant at grade G.2 on a short-term appointment up to 29 February 1996. She was assigned to the Stamp Distribution Unit in Section B of the Bureau and her work consisted in sorting out stamps for dispatch to the Union's member countries. The letter of appointment stated that since she was a short-term staff member the UPU Staff Regulations and Rules did not apply to her. The Union extended her appointment to 30 June, then up to 31 December 1996.

By a minute of 25 July 1996 the head of Section B told her that she must raise her output. She saw the Director-General and got him to agree to an official enquiry by the internal auditors into the quality of her work. In their report of 2 August the auditors found that her output was up to standard but that in future she should "keep it on a par with the average maintained by other staff in her unit". In a minute of 9 August the head of

Section told her that their average output had gone up and she must raise her own accordingly; moreover, unless she changed her behaviour towards colleagues and supervisors she would have to go. A minute of 12 August from the head of Section again warned her of the risk of dismissal for the same two reasons. She wrote to the Director-General on the same day asking for some explanation. In a minute of 13 August the head of Section confirmed the criticisms of her on the Director-General's behalf.

By a letter of 16 August the Assistant Director-General gave her notice that her appointment would be terminated on 26 August 1996 because her output was below par. In a letter of 22 August she asked the Director-General to reconsider. He refused in a letter of 29 August, again on the grounds of low output and failure to get on with colleagues.

The complainant appealed to the industrial tribunal of Berne on 5 September and so informed the Director-General. In a letter of 4 October the Director-General told her that the Union was not subject to Swiss law and that "the appeals procedure applied to the regular staff [was] also applicable, by analogy, to short-term staff".

In a letter of 7 December she appealed to the Joint Appeals Committee against the decision of 16 August 1996. She admitted that she was out of time but asked the Committee to waive the time limit because of the "exceptional nature" of the case. The Director-General informed her in a letter of 12 February 1997 that her appeal was time-barred and therefore irreceivable. That is the decision she is impugning.

B. The complainant submits that the reason why she failed to apply within the time limit in the Staff Rules was that the Union gave her "wrong information". Only on 4 October 1996 was she informed "for the first time" of the proper procedure.

On the merits she contends that it was "unfair and unreasonable" to ask her "twice in a fortnight" to raise her output, which had until then proved acceptable. Besides, the internal auditors' report said that the quantity of stamps she was processing was satisfactory and it would be very difficult, if not impossible, for her to do better. She rebuts the charges of "unacceptable behaviour" on the grounds that they "rest on mere hearsay".

She asks the Tribunal to quash the impugned decision and to order reinstatement or, failing that, payment of "salary due to [her] under the terms of [her] contract from 26 August to 31 December 1996".

C. The Union replies that the complaint is irreceivable. It denies giving the complainant "wrong information". Her letter of 22 August 1996 shows that she knew full well which rule applied to her. As from the date on which the Director-General's reply of 29 August was notified to her, she had a month in which to appeal to the Committee, but "for reasons unknown to the defendant" she failed to do so. So she alone is to blame for missing the time limit.

The Union's pleas on the merits are subsidiary. It submits that the dismissal was warranted. The complainant's output was far below that of the other staff. Contrary to what she asserts, the report of 2 August 1996 did say that she had to improve. The Union cites several minutes from the internal auditor referring to her "unsatisfactory behaviour" and unconscientious attitude to work.

It asks the Tribunal to reject her claim to repayment of costs.

D. In her rejoinder the complainant rebuts all the Union's pleas and presses her claims.

E. In its surrejoinder the Union observes that the complainant "offers no new argument on the lawfulness of the dismissal".

CONSIDERATIONS

1. On 16 August 1996 the International Bureau of the Universal Postal Union (UPU) gave the complainant notice that it would terminate her short-term appointment on 26 August 1996. On 22 August she applied to the Director-General for review of that decision, and on 29 August he refused.

2. She then challenged his decision before the industrial tribunal of the city of Berne.

3. The Director-General informed her in a letter of 4 October 1996 that Swiss law did not apply to her case and that she might appeal to the Joint Appeals Committee. The Union sent her copies of the material provisions of the Staff Regulations and Rules.

4. Under Staff Rule 111.3 she had a month in which to put her case to the Appeals Committee. Even if time were deemed to run from the date at which she received copies of the material rules, the appeal she filed on 7 December 1996 was time-barred. The Committee accordingly decided that the appeal was irreceivable.

5. The Tribunal shares that view. Her complaint is irreceivable under Article VII(1) of its Statute because she has failed to exhaust her internal remedies.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

MICHEL GENTOT JULIO BARBERIS JAMES K. HUGESSEN

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-FOURTH SESSION

***In re* Steele (No. 3)** **Judgment 1691**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr. David Brian Steele against the International Labour Organization (ILO) on 27 January 1997 and corrected on 16 March 1997;

Considering Articles II, paragraph 1, and VII, paragraph 3, of the Statute of the Tribunal and Article 7 of its Rules;

Having examined the written submissions and disallowed the complainant's application for hearings;

CONSIDERATIONS

1. The complainant left the service of the ILO at the end of 1975 in the circumstances narrated in Judgment 310 delivered on 6 June 1977, in which the Tribunal declined to order renewal of his contract and his reinstatement. That matter is therefore *res judicata*.

2. The complainant addressed a letter to the Director-General of the International Labour Office on 24 November 1996. It was delivered to the Office on 29 November 1996 and asked for a final decision on a request by him for a suitably organised internal inquiry which, if positive, would result in compensation and redress for the various injuries he had alleged.

3. He lodged a complaint with the Tribunal on 27 January 1997 challenging the implied rejection of that request under Article VII(3) of the Tribunal's Statute.

4. Quite apart from the fact that the complainant did not observe the time limits laid down in that provision, the Tribunal is not competent under

Article II(1) of its Statute to entertain the substance of his complaint, which is not based on any allegation of non-observance in substance or in form of the terms of his appointment or of the provisions of the ILO Staff Regulations.

5. Since the complaint is therefore clearly irreceivable, the Tribunal dismisses it summarily under Article 7 of its Rules.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

Mella Carroll

MELLA CARROLL

MARK FERNANDO

JAMES K. HUGESSEN

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-FOURTH SESSION

***In re* Steele (No. 2)** **Judgment 1692**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. David Brian Steele against the World Health Organization (WHO) on 27 January 1997 and corrected on 16 March 1997;

Considering Articles II, paragraph 5, and VII, paragraph 3, of the Statute of the Tribunal and Article 7 of its Rules;

Having examined the written submissions and disallowed the complainant's application for hearings;

CONSIDERATIONS

1. The complainant left the service of the WHO on 30 June 1985 in the circumstances narrated in Judgment 789, which the Tribunal delivered on 12 December 1986. A complaint appealing against the decision to end his appointment and seeking reinstatement was unsuccessful. That matter is therefore *res judicata*.

2. The complainant addressed a letter to the Director-General of the World Health Organization on 24 November 1996. It was delivered to the WHO on 2 December 1996 and asked for a final decision on a request by him for a suitably organised internal inquiry which, if positive, would result in his "reintegration" and compensation and redress for the various injuries he had alleged.

3. He lodged a complaint with the Tribunal on 27 January 1997 challenging the implied rejection of that request under Article VII(3) of the Tribunal's Statute.

4. Quite apart from the fact that the complainant did not observe the time limits laid down in that provision, the Tribunal is not competent under Article II(5) of its Statute to entertain the substance of his complaint, which is not based on any allegation of non-observance in substance or in form of the terms of his appointment or of the provisions of the WHO Staff Regulations.

5. Since the complaint is therefore clearly irreceivable, the Tribunal dismisses it summarily under Article 7 of its Rules.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

Mella Carroll

MELLA CARROLL

MARK FERNANDO

JAMES K. HUGESSEN

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FOURTH SESSION

***In re* Leprince (No. 4)** **Judgment 1693**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mrs. Georgette Leprince against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 23 December 1996, UNESCO's reply of 5 February 1997, the complainant's rejoinder of 21 February and the Organization's surrejoinder of 19 March 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. As Judgment 876 explains, under A, the complainant, a Frenchwoman who was born in 1943, joined the staff of UNESCO in 1969 as a secretary at grade G.2. As from 15 March 1988 she was assigned to the office of the Assistant Director-General for External Relations. She was promoted in January 1991 to secretarial assistant at grade G.6.

In March 1994 the Director-General reformed the Bureau for External Relations. The Assistant Director-General for Culture (ADG/CLT) was appointed Assistant Director-General for External Relations. Since he wanted to keep his former secretarial assistant, whose grade was also G.6, the Organization switched the two secretaries, transferring the complainant as from 20 June 1994 to the office of the new Assistant Director-General for Culture.

She filed a complaint against the transfer but Judgment 1556 dismissed it. Judgment 1648 dismissed her application for review of that judgment.

By a memorandum of Friday 25 August 1995 the Assistant Director-General for Culture told her that "In view of the new structure ... being set up for the 28th session of the General Conference", to be held from 25 October to 16 November 1995, she was to be transferred as from Monday 28 August to the office of the Coordinator of the World Decade for Cultural Development. But she took leave from 28 August to 17 September and thereafter produced a medical certificate in support of the grant of sick leave until 26 November. She was absent from 29 November to 18 December owing to a public transport strike and from 19 to 31 December 1995, again on sick leave.

On 8 November she filed an internal appeal against the decision of 25 August 1995. In its report of 5 July 1996 the Appeals Board concluded that there were no grounds for transferring her at such short notice. It observed that after the original decision the Organization ordered three further transfers of her over three months. The Board recommended granting her an extra month's pay "to compensate for the harassment and humiliation" and putting her, "on a priority basis", on a post which afforded prospects of promotion to P.3.

By a letter of 4 October 1996 the Director-General dismissed her appeal "as being without merit and lacking a cause of action". That is the decision she is impugning.

B. The complainant submits that the Organization is trying to deny her right of defence by repeatedly transferring her so as to take away any cause of action.

The reason given for the impugned decision was invalid: the "new structure" which prompted the decision never came about and she never got a description of her new duties.

Coming as it did, the impugned decision was an affront to her dignity. It has meant lesser responsibility and robbed her of any chance of promotion. So it may be seen as a disciplinary sanction, and as such tainted with abuse of process.

Citing the case law, the complainant maintains that the Organization acted in bad faith by failing to give her due notice of transfer. The decision shows bias: the Organization wanted to settle a score for her refusing the transfer to the Culture Sector. The Director-General may have discretion in assigning staff, but he must not act arbitrarily.

She asks the Tribunal to "declare unlawful" the Director-General's decision of 4 October 1996; to order the Organization to reassign her to the office of the Assistant Director-General for Culture; to award her one year's earnings in moral damages and 15,000 French francs in costs.

C. The Organization replies that the complainant has no cause of action. Because she was on sick leave the impugned decision had no effect, and it was superseded with another. Her constant objections to transfer raise doubts about her fitness for the international civil service.

The grounds for the decision were valid since the Culture Sector did undergo reform. There was "no need" for a description of her duties because she never performed them anyway. Besides, her work would not have changed much: "the duties of an assistant secretary are standard". So there was no actual relegation, particularly as she would have kept grade, title and salary and stayed in the same Sector. Her charge of loss of promotion is unfounded. Promotion being a "future and uncertain event", she suffered no injury on that score.

Citing Judgment 282 (*in re* Pessus), UNESCO contends that it was under no obligation to consult her beforehand; so it was not in breach of good faith. It rejects her charge of bias.

D. The complainant presses her pleas. She maintains that "the Organization keeps masking the unlawfulness of the impugned decision by saying it never went into effect". It did commit a breach of procedure since, as is plain from its reply, the real reason for the transfer was that her performance was supposedly below par, though it had never been before.

E. In its surrejoinder the Organization denies the complainant's allegations and presses its pleas.

CONSIDERATIONS

1. The complainant joined UNESCO on 21 July 1969 under a fixed-term appointment for one year. She later had it converted into a permanent one. She got several promotions, the last of them in January 1991 to the post of secretarial assistant at grade G.6. Her first assignment was in the Director-General's office. She later went to the office of the Assistant Director-General for Social and Human Sciences and, as from March 1988 to the office of the Assistant Director-General for External Relations.

2. In March 1994 UNESCO had her switch posts with another secretary and assigned her to the office of the new Assistant Director-General for Culture. Judgment 1556 dismissed her complaint against that transfer.

3. On 25 August 1995 she was transferred to the office of the Coordinator of the World Decade for Cultural Development. She lodged an internal appeal against that decision, but there then came a decision to assign her to the office of the Principal Director of the Culture Sector. The text of the decision was sent to her by post on 27 September 1995 to give her official notice of it. In a report of 5 July 1996 the Appeals Board recommended paying her one month's earnings in damages and putting her on a post which would afford her an opportunity for promotion to grade P.3. On 4 October 1996 the Director-General rejected her appeal as being without merit and lacking a cause of action. That is the final decision she is now impugning.

4. The Organization submits that since the decision of 25 August 1995 to transfer her to the Coordinator's office was superseded her appeal against it disclosed no cause of action.

5. In her rejoinder the complainant does not deny that the decision she was challenging was superseded. But she asks the Tribunal, on the strength of the Appeals Board's recommendation, to bear in mind the whole run of measures the Organization has taken against her, simply because she dared challenge the original transfer. She adds that in any event she does have a cause of action: the impugned decision is unlawful since it caused her injury for which she seeks redress.

6. The Tribunal will not take account of the later transfers. She has not challenged them in this complaint; indeed she herself states that she is not asking the Tribunal to quash them, but only the decision of 25 August 1995.

7. She contends that "the transfer of 25 August 1995 was the first of several, ordered over a short time, which had the effect of diminishing the responsibilities of her superior or her own as a secretarial assistant, or both". As a result she has "lost any chance of promotion" to grade G.7.

8. An administrative authority may review, change or reverse any decision unless it is expressly forbidden to do so and provided that the acquired rights of staff are safeguarded: see Judgment 618 (*in re* Timmermans). The complainant had no such right under the decision of

25 August 1995. Indeed she challenged it. Before giving any effect to it UNESCO replaced it with a new one that was taken lawfully and before this complaint was filed. So her challenge to the impugned decision discloses no cause of action. Being unsound, her complaint cannot succeed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation, the French text alone being authoritative.

EIGHTY-FOURTH SESSION

***In re* Benaïssa** **Judgment 1694**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Rachid Benaïssa against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 22 April 1997, UNESCO's reply of 15 July, the complainant's rejoinder of 8 September and the Organization's surrejoinder of 20 October 1997;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Algerian born in 1942, joined the staff of UNESCO in 1978. At the material time he was employed as a reviser at grade P.4.

In March 1993 he applied for the reimbursement of expenses he had incurred for his five children to have private tuition in the first two terms of the 1992-93 academic year. The tuition was in Arabic, French, management, economics, mathematics, physics, chemistry and natural sciences. The expenses came to 176,160 French francs for 1,468 hours of coaching in all, including 690 hours for Arabic and 778 for the other subjects.

After he had made two enquiries about his claim the Bureau of Personnel sent him a memorandum of 10 May 1994, asking, in accordance with Staff Rule 103.12(m), for proof that the tutoring had been indispensable and for bills certified by some "statutory authority". On

8 June he submitted to the Director-General a protest under Article 7(a) of the Statutes of the Appeals Board. By a memorandum of 19 July 1994 the Director of the Bureau told him on the Director-General's behalf that the one of 10 May did not constitute an "administrative decision" that affected him adversely within the meaning of Article 7(a). On 23 June the Bureau had told him in writing that it was refusing to pay for his eldest daughter's education costs on the grounds that she had already had four years' post-secondary studies and no longer met the requirements of Rule 103.12(b).

On 19 July 1994 he gave notice of appeal under Article 7(c) of the Statutes of the Appeals Board and on 19 September filed a detailed brief. In its report of 4 December 1996 the Board recommended reimbursing all "duly receipted" expenditure for his four younger children. As for his eldest daughter, it recommended considering her case "on the merits" and in view of her poor health granting her half of the annual amount payable under the Staff Rules as a "reasonable" sum. By a letter of 22 January 1997, which he impugns, the Director-General rejected his appeal.

B. The complainant submits that UNESCO broke Rule 103.12(b) by taking account of his eldest daughter's first two years of higher education, in which she failed. The provision authorises payment of the education allowance for up to four years for a course of study, and so he was entitled to reimbursement in full.

He argues that the conditions set out in Rule 103.12(m) were met: the only way of learning Arabic in Paris is through private tuition. Supplementary tuition in the other subjects was warranted by the academic problems his children had been facing. As for the certified bills the Administration wanted, the condition was a new one, at odds with long-standing practice and impossible to meet.

Lastly, he objects to having faired less well than other staff, to UNESCO's failure to tell him why it would not pay up and to delays in the internal appeals proceedings.

The complainant seeks the quashing of the "decision" dated 10 May 1994 and of the one the Director General took on 22 January 1997, and asks the Tribunal to order the Organization to pay him the amount claimed, the cost of later tuition incurred up to the date of the judgment and interest thereon. He also claims material and moral damages and costs.

C. In its reply the Organization says that his complaint is irreceivable for failure to abide by the internal procedure. The memorandum of 10 May was not a final decision; it did not affect him adversely; and appeal did not lie against it. What is more, he failed to challenged the memorandum of 23 June as required under Article 7(a) of the Board's Statutes before lodging his appeal with that body.

Subsidiarily, UNESCO refutes his interpretation of Article 103.12(b). As to the memorandum of 10 May 1994, it submits that the purpose of the education grant is to help in coping with expatriation and it is up to the claimant to prove that it is warranted. His claim being "dubious", the Organization was entitled to ask him to substantiate it. In any event it would have been quite right to turn him down since his claim showed "a host of inconsistencies".

D. In his rejoinder the complainant points out that the Director of the Bureau of Personnel invited him by a memorandum of 13 May 1997 to put his case to the Tribunal if he wanted to challenge the decision of 22 January and did not then mention any problem of receivability.

On the merits he contends that even if the Organization's interpretation of 103.12(b) is right the Director-General may still take account of such special circumstances as his daughter's health. He presses his other pleas and charges the Administration with breach of good faith, several of his claims having remained in abeyance for over a year even though they were in order.

E. In its surrejoinder UNESCO denies that the only way of picking up Arabic in Paris is private tuition and it lists thirty institutions there offering classes in the language.

In its memorandum of 13 May 1997 telling the complainant about the appeals procedure the Organization did not waive its right to challenge receivability. Although the Director-General may relax certain conditions the Tribunal will not order him to do so. Lastly, it accuses the complainant of acting in bad faith by objecting to delays in handling his claims after it had told him they would not be settled until it got a ruling from the Tribunal.

CONSIDERATIONS

1. The complainant, an Algerian who was born on 16 April 1942, has served UNESCO at its headquarters in Paris since 21 June 1978. He started out as a translator and minute writer at grade P.3 and is now a reviser at grade P.4, step 12.

He has four daughters and a son:

Kawthar, born on 12 May 1971;

Amina, born on 15 August 1975;

Asma, born on 26 April 1978;

Mohamed, born on 16 November 1980;

Myriam, born on 25 November 1985.

In March 1993 he put to UNESCO a claim to repayment of the costs of private tuition in the first two terms of the 1992-93 academic year, i.e. from September 1992 to March 1993:

	hours	French francs
Kawthar (university) management, economics and Arabic	267	32 040
Amina (secondary) physics, chemistry and Arabic	273	32 760
Asma (secondary) physics, chemistry and Arabic	273	32 760
Mohamed (secondary) mathematics, natural sciences, French and Arabic	379	45 480
Myriam (primary) spelling, French and arithmetic	276	33 120
Total	1 468	176 160

Of the total number of hours 690 were for lessons in literary Arabic and 778 for additional coaching in subjects with which the children were having difficulty.

Since the claim was a large one the Organization asked for more information.

2. In answer to a letter from the complainant the Bureau of Personnel sent him a memorandum on 10 May 1994 which said:

> "2. With regard to your charge about 'the blocking of the payment of school fees' I wish to point out that only your claim to repayment of the costs of private tuition has not been met. As you will have seen, the other costs were repaid promptly.
>
> 3. In answer to your request: 'Please explain why you have so far refused to repay my children's school fees', I refer you to Staff Rule 103.12(m). Please read it very carefully and provide evidence to show that the private lessons — the only costs not yet met — were indispensable. The costs will not be met unless you produce bills certified by some statutory authority."

On 8 June 1994 the complainant wrote to the Director-General objecting to the reply and saying that unless his claim was met his letter should be treated as an appeal.

3. On 23 June 1994 the Bureau of Personnel told the complainant that his claim for Kawthar was rejected because, under Staff Rule 103.12(b), the education grant could not be paid beyond the end of the fourth year of post-secondary studies, and Kawthar had started her degree course in the 1988-89 academic year.

4. On 19 July 1994 the Director of the Bureau of Personnel wrote to the complainant on the Director-General's behalf pointing out that the memorandum of 10 May 1994 was not a decision adversely affecting him within the meaning of Article 7(a) of the Appeals Board's Statutes but simply a request for proof of payment.

5. The case nonetheless went to the Board. The Administration retorted that the memorandum of 10 May 1994 was not a decision. As to the claims for Kawthar and for the four other children the Board recommended accepting the claims for the four on the grounds that they were properly documented; as to Kawthar it held that the material rule was open to interpretation and suggested paying half of the annual amount payable under the Staff Rules. The Director-General dismissed the appeal outright in a decision of 22 January 1997.

6. The complainant seeks the quashing of that decision and of the "decision" of 10 May 1994 and asks the Tribunal to order the Organization to pay him the amount claimed, the costs of later education incurred up to the date of the judgment, interest thereon, material and moral damages, and costs. He accuses the Organization of mistakes of law, abuse of discretion and misuse of authority.

The Organization asks the Tribunal to rule that the complaint is irreceivable or, failing that, to dismiss it on the merits. It submits that the complainant failed to lodge an internal appeal against the decision of 23 June 1994 and that the memorandum of 10 May 1994 was not a decision that affected him adversely and so not challengeable in an internal appeal or complaint. Even if it were receivable the complaint would be without merit. For one thing the decision on Kawthar's costs is lawful and, for another, even supposing the memorandum of 10 May 1994 were a decision, its sole purpose was to ask for supporting evidence which was indispensable in view of the wide discretion that the rule allows the Director-General.

Receivability

7. According to Article VII(1) of the Tribunal's Statute a complaint is receivable only when the internal means of redress have been exhausted.

(a) The claim to repayment of any education costs incurred since the lodging of the claim of March 1993 is new and so irreceivable.

(b) There was no specific internal appeal against the decision of 23 June 1994 on Kawthar's costs. But when that decision was taken the claim for Kawthar was already in dispute: it had been submitted to the Director-General along with those for the other four children, so it too was examined by the Appeals Board. The Director-General then dismissed the appeal, without stating any particular reason. A memorandum of 13 May 1997 from the Director of the Bureau of Personnel told the complainant that he could go to the Tribunal. So he was entitled to take it that the claim for Kawthar had been entertained by the Board and dismissed by the impugned decision. Good faith requires that the internal means of redress be deemed to have been exhausted and on that score the complaint is receivable.

(c) Precedent has it that a complaint is irreceivable when the communication at issue is not a decision that adversely affects the complainant. A decision is an action by an officer of an organisation which has a legal effect on the staff member: see Judgment 532 (*in re* Devisme). It is not a letter that merely acknowledges receipt of an appeal and says that a decision will come later (*ibidem*), nor an inference drawn from the absence of a reply to a letter calculated to "initiate a discussion": see Judgment 336 (*in re* Hayward). The complainant suffers no injury from having to wait for a challengeable decision, for example when an organisation says that it will meet a claim to costs as soon as it has proper supporting evidence: see Judgment 1506 (*in re* Delos) under 7 to 9. Likewise, appeal and complaint will be irreceivable where the organisation's rules prescribe some prior formality: see Judgment 468 (*in re* Jadoul), which cites the example of "something which is only one step in a complex procedure and of which only the final outcome is subject to appeal".

In this case the memorandum of 10 May 1994 was plainly not a decision on the complainant's claim.

Indeed it may not amount even to a subsidiary decision on the matter of supporting evidence, since it sets no time limit, does not affect the complainant adversely and so has no legal effect on his position. Even if it were a decision he would, as the case law says, suffer no injury from having to await a refusal which he might challenge on the grounds of breach of the rules on the award of education costs.

His claims other than those concerning Kawthar are therefore irreceivable.

The merits

8. Rule 103.12(b) says:

> "The [education] grant shall be payable up to the end of the fourth year of post-secondary studies, but cannot be paid beyond the award of the first recognised degree or beyond the end of the academic year during which the child reaches the age of 25."

9. In the complainant's submission the phrase "the end of the fourth year of post-secondary studies" in 103.12(b) may be taken to mean, not the number of years actually spent in study, but a stage in the school curriculum that is identified by reference to school year. If so, and if the student changes courses, time spent on the first course does not count. Nor should it count if the student repeats a school year.

Citing a judgment of the United Nations Administrative Tribunal (No. 301, *in re* Sanchez), the Organization rejects that view and submits that it does not have to go on paying for any child who keeps failing.

That judgment is of course right: it properly interprets the rule. Although Rule 103.12 does not ignore difficulties altogether, there is no compelling reason why the Organization should have to go on paying costs beyond the fourth post-secondary year for a student who has chosen to change courses.

So the decision rejecting the claim for Kawthar is quite lawful.

The complaint must therefore fail.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI JAMES K. HUGESSEN

A.B. GARDNER

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FOURTH SESSION

***In re* Schwaller** **Judgment 1695**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Marcel Schwaller against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 23 November 1996, Eurocontrol's reply of 28 February 1997, the complainant's rejoinder of 1 May and the Organisation's surrejoinder of 11 July 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Under Article 67(1)(c) of the Staff Regulations, which is about family allowances, Eurocontrol employees get an education allowance. Article 81 says that someone entitled to invalidity pension is eligible for family allowances too.

The criteria for granting the education allowance are set in Article 3 of Rule No. 7 on remuneration, which says in the third paragraph:

> "The maximum prescribed in the first paragraph shall be doubled for:
>
> - ...
> - an official whose place of employment is at least 50 km from an establishment of higher education in the country of which he is a national or working in his language, provided that the child actually attends an establishment of higher education at least 50 km from the place of employment and the official is entitled to the expatriation allowance, the latter condition shall not apply if there is no such establishment in the country of which the official is a national."

Those provisions are reproduced and enlarged on in paragraph 3.2 of office notice 12/94 of 5 July 1994. Paragraph 6 of the notice says:

> "The instructions specified above also apply to staff assigned to non-active status or pensioners insofar as they are entitled to family allowances."

The complainant, a citizen of Luxembourg who was born in 1940, is a former employee of Eurocontrol. The last post he held with the Organisation was as deputy assistant at grade B4 at Eurocontrol's Institute of Air Navigation Services in Luxembourg. He has been getting an invalidity pension since 1 December 1993 and lives in Luxembourg.

In September 1995 his son Laurent went to Brussels to study architecture, for which training is not to be had in Luxembourg. By a decision of 1 December 1995, for which the Director General had delegated authority, the head of the Pensions Section granted the complainant as from 1 September 1995 an education allowance for his son at the "U" rate, which is equivalent to the "normal ceiling" of the allowance.

Believing that he was entitled to the "F" rate, which is known as the "double ceiling", the complainant wrote to the Director of Human Resources on 13 December 1995 to ask why he had been granted only the "U" rate. On 11 January 1996 the acting head of the Pensions Section told him that, according to paragraph 3.2 of office notice 12/94, the allowance was paid only to serving staff and, being retired and having no place of employment, he was not entitled to the "double ceiling".

On 11 March he submitted a "complaint" to the Director General under Article 92(2) of the Staff Regulations asking him to reverse the decision of 1 December 1995 and withdraw office notice 12/94 on the grounds that they were unlawful. The Joint Committee for Disputes, to which the matter was referred, concluded in its report of 31 July that the "complaint" was without merit. In a letter of 21 August 1996 to the complainant the Director of Human Resources endorsed the Committee's conclusion on the Director General's behalf. That is the decision he is impugning.

B. The complainant submits that the purpose of office notice 12/94, particularly paragraph 6, was to broaden the ambit of Rule No. 7 to allow retired staff to benefit from the "F" rate. To apply that rate only to serving officials was therefore unlawful. The "place of employment" should, in the case of a retired staff member, be the last place of employment or the place of residence. Any other construction would make paragraph 6 pointless. So

Eurocontrol broke the rules by refusing to pay the complainant the "F" rate on the pretext that he had no place of employment.

He asks the Tribunal to quash the decision of 21 August 1996, to rule that office notice 12/94 is unlawful and to award him costs.

C. In its reply Eurocontrol contends that office notice 12/94 does not extend the application of Rule No. 7 to retired officials and that paragraph 6 is not a rule. The conditions for granting the "F" rate are set out in Article 3 of Rule No. 7 and apply only to serving officials. Retired staff have no place of employment, which the Organisation defines as the place where a serving staff member carries out his duties and which the Director General determines at the time of appointment or after transfer. Retired staff have only a place of residence. So they are not entitled to the "F" rate.

The Organisation asks that costs be awarded against the complainant.

D. In his rejoinder the complainant asserts that the education allowance is a social benefit intended to pay for the studies of children of serving or former staff. The Staff Regulations draw no distinction between serving and retired staff as to entitlement to the allowance. On the contrary, the whole purpose of Article 81 is to ensure that both categories get the same treatment. An office notice may not restrict a right conferred by the Staff Regulations.

E. In its surrejoinder the Organisation observes that Article 3 of Rule No. 7 is quite unambiguous: only serving officials are entitled to the double maximum. The ranking of rules does not preclude doubling the maximum of the allowance to make up for the special burden laid on some staff because of their place of employment. Unlike them, retired officials are free to live where they want.

CONSIDERATIONS

1. The complainant, a citizen of Luxembourg, is a former official of Eurocontrol. He has been on an invalidity pension since 1 December 1993.

2. In September 1995 his son began studying architecture in Brussels, no course being available in Luxembourg.

3. On the Director General's behalf the head of the Pensions Section informed him by a decision dated 1 December 1995 that he would get the education allowance for his son's studies as from 1 September 1995 at the "normal ceiling", which is known as the "U" rate.

4. The complainant claimed the allowance at the "double-ceiling" rate known as "F". On 13 December 1995 he sent a request for review to the Director of Human Resources. The reply of 11 January 1996 was unfavourable. And on 11 March 1996 he lodged an internal "complaint" challenging the decision of 1 December 1995 and claiming the withdrawal of office notice 12/94 of 5 July 1994 on education allowance.

5. The Joint Committee for Disputes recommended rejecting his "complaint" on the merits, and the Director General did so by a decision of 21 August 1996.

That is the decision he is impugning, and his complaint is receivable.

6. The complainant wants the Tribunal to set aside the decision of 21 August 1996 "denying him the double ceiling for his son, Laurent"; to declare unlawful office notice 12/94 of 5 July 1994 on education allowance; and to award him costs.

7. It is common ground that the complainant is entitled to family allowances, and so to the education allowance, under Article 67 of the Staff Regulations. The only material issue is whether he qualifies for the allowance at the double-ceiling rate.

8. The provisions on education allowance are in Article 3 of Rule No. 7, and office notice 12/94 recapitulates them and carries them further. Paragraph 3.2 of the notice says:

> "The flat-rate monthly allowance is 100% (rate U).
>
> The flat-rate monthly allowance will be doubled (rate F) provided *all* the following conditions are satisfied:
>
> a) the official or servant is in receipt of expatriation allowance;
>
> b) the place of employment is at least 50 km from an establishment of higher education working in his language in the country of which he is a national;
>
> c) the child actually attends an establishment of higher education at least 50 km from the place of employment.
>
> The requirement under a) above will be waived if there is no such establishment in the country of which the staff member is a national."

9. The complainant submits that he qualifies for the double rate and Eurocontrol was wrong to refuse it on the grounds that rate F applies only to serving staff and he, a pensioner, has no "place of employment" and gets no expatriation allowance.

10. He relies on paragraph 6 of the notice, which says that "the instructions specified above also apply to staff assigned to non-active status

or pensioners insofar as they are entitled to family allowances". That, he says, extends the application of the provisions to pensioners and makes it unlawful to "confine it to serving staff".

11. He maintains that "for the pensioner the 'place of employment' can mean only the last place of employment or the place of residence" and "any other construction of paragraph 3.2 b) would make the notice inconsistent and paragraph 6 inapplicable by setting conditions no one could meet".

12. The Tribunal is satisfied on the evidence that the purpose of office notice 12/94 was not to extend the coverage of certain provisions in Rule No. 7 to pensioners but to recapitulate and explain the rules on education allowance. Paragraph 6 merely serves to reaffirm that pensioners are entitled to the allowance.

13. To qualify for the double-ceiling rate the claimant must meet the conditions in 3.2.

14. As a former official the complainant has no duty station, i.e. "place of employment". The Director General determines that place on appointment or on transfer. So the complainant does not qualify for the double rate (F).

15. The argument that the pensioner's home should be assimilated to the place of employment is immaterial and must fail, the pensioner being free to live wherever he chooses.

16. None of the complainant's pleas warrants quashing the decision of 21 August 1996. Nor has he shown that office notice 12/94 is unlawful: as has been said, all it does is recapitulate and explain the material rules.

17. In his rejoinder the complainant submits that Articles 67 and 81 of the Staff Regulations show the intent to have been to put on a par the children of serving staff and those of retired staff; any other construction would, he says, unlawfully narrow the intended meaning and discriminate between the two groups. The answer to that is that the principle of equal treatment holds good only as between those who are in like case, and here the two groups obviously are not.

18. Although the complaint fails the Tribunal disallows Eurocontrol's counterclaim to costs.

DECISION

For the above reasons,

The complaint and the defendant's counter-claim to costs are dismissed.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

MICHEL GENTOT JULIO BARBERIS SEYDOU BA

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FOURTH SESSION

***In re* Felkai** **Judgment 1696**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Eva Felkai against the Customs Co-operation Council (CCC) on 15 December 1996, the CCC's reply of 12 March 1997, the complainant's rejoinder of 23 May and the Council's surrejoinder of 14 August 1997;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Belgian who was born in 1944, joined the Council on 11 April 1994 as a publications officer at grade B4. Her contract was for three years, including six months' probation.

On 29 August 1994 her supervisor drafted a probation report in which he acknowledged her "undoubted abilities" but said she had a difficult temperament. His conclusion was to propose the extension of her probation by six months. The Secretary General agreed and informed her, at a meeting of 6 September and in a letter of 27 September, that her probation was extended from 10 October 1994 to 10 April 1995.

From 1 October 1994 there was a new supervisor, Mrs. Trolle. In a probation report which she wrote on 22 February 1995 and which covered the further six months of probation she confirmed the earlier assessment of the complainant's abilities and shortcomings, said that her administrative work was not up to scratch, and recommended terminating her appointment.

By a letter of 24 February the Secretary General told her that her appointment would not be confirmed. The reason he gave was that she was tactless and awkward in her dealings with others and fell far short in her administrative work. By a letter of 10 March she asked the Secretary General to review his decision. He refused in a letter of 13 March 1995. She then appealed to the Appeals Board. She filed a brief in support of her appeal on 28 November 1995. In its report of 9 August 1996 the Board concluded that "the Secretary General has no obligation to alter his decision of 24 February 1995". On 2 September 1996 the Secretary General told the complainant that his final decision was not to confirm her appointment. That is the one impugned.

B. The complainant has four pleas.

The first is that there was breach of Regulation 9(b) inasmuch as the Staff Committee was not consulted before the decision was taken to terminate her appointment.

Secondly, there was breach of her right to a hearing as set out in Judgment 1386 (*in re* Bréban) and other rulings. The probation report of 22 February 1995 was not communicated to her, and she was allowed only severely restricted access to her personal file.

Thirdly, the terms of her probation were improper in that the organisation ignored the official description of her duties in several respects. She was not allowed to delegate any duties to subordinates, her proposals for reform were overlooked and she was not given due written warning.

Fourthly, only 27 days went by after the change of supervisors before Mrs. Trolle wrote the probation report of 22 February 1995. It is obvious from earlier rulings by the Tribunal that that period was not long enough. The Secretary General misjudged or overlooked material facts, such as the substantial change in the publications officer's duties with the addition of technical, commercial and legal responsibilities, and the lack of cooperation from the complainant's subordinates and of help from her supervisors.

The complainant asks the Tribunal (a) to set aside the Secretary General's decisions of 24 February 1995 and 2 September 1996 and (b) to order the Council to pay her material damages corresponding to the difference between the salary and other allowances due to her from 11 April 1995, the date of termination, up to the date at which her three-year appointment would have expired had it been confirmed; the salary and allowances which she would have earned between those two dates; moral damages amounting to 1 million Belgian francs; interest at the rate of 10 per cent a year on those sums as from 11 April 1995; and costs.

C. In its reply the Council denies breach of Regulation 9(b). According to consistent practice only the Staff Committee's chairman and vice-chairman had to be consulted, and they were.

The Council acknowledges that the probation report of 22 February 1995 was not at the outset passed on to the complainant. But it points out that her right to a hearing was in no way infringed and that Judgment 1386 is irrelevant in determining whether the organisation is under the duty of communicating the probation report before the decision not to confirm the appointment. Time and again the complainant was told of the criticisms of her performance and she had the opportunity of discussing them both before the decision was taken not to confirm her appointment and in the proceedings before the Appeals Board. It is also plain from her pleas that she did have full access to her personal file.

The Council observes that she acknowledges having had the post description that was appended to the notice of vacancy, and she does not deny that it did correspond to her actual duties. There was nothing wrong with her probation. She was duly warned about her shortcomings.

The Council contends that the period of 27 working days that had elapsed before the new supervisor wrote the probation report of 22 February 1995 was quite long enough and that she was quite fit to assess the complainant. In taking account of her supervisors' concurring opinions the Secretary General committed no obvious error of appraisal and did not overlook any material fact.

D. In her rejoinder the complainant contends, as to the lack of consultation of the Staff Committee, that according to the *patere legem* rule administrative practice warrants no exception to the Staff Regulations. The Council has failed to show anyway that there was such practice. The chairman of the Staff Committee is not qualified to represent the Committee. The complainant produces a letter from its vice-chairman challenging the Council's point of view.

As to the breach of her right to a hearing, she contends that Judgment 1386 contains a ruling of general and not particular application and that the defendant is confusing the rules on warnings during probation with the rules on probation reports.

She reaffirms and presses her other pleas.

E. In its surrejoinder the Council submits that the practice it is relying on as to consulting the Staff Committee does not so much constitute any exception to the rules as determine how to apply them.

It is, in its view, clear from the case law that the probationer must be told of any shortcomings in his performance, not that the actual probation report must be notified to him.

The Council presses the pleas in its reply.

CONSIDERATIONS

1. The complainant joined the staff of the Council on 11 April 1994 under a three-year appointment, the first six months being probationary.

A probation report that her then supervisor, the head of Financial Services, wrote on 29 August 1994 said that though she had "undoubted abilities" her temperament was awkward. He recommended extending the period of probation. The Secretary General saw her on 6 September. He told her about the extension and he must then have given her the reasons for it. He confirmed the extension in writing on 27 September, and she accepted.

A new supervisor, Mrs. Trolle, who was head of Administrative Services, wrote a second probation report on 22 February 1995. It said much the same thing as the first and recommended that unless the complainant improved she should go.

On 23 February 1995 the Administration spoke to the chairman of the Staff Committee, the vice-chairman too being present. The chairman saw no need to consult the Committee as a whole and endorsed the recommendation for termination of the complainant's appointment.

The chairman was to be absent for three weeks and the vice-chairman replaced him. By a memorandum he wrote later on 23 February the vice-chairman asked the head of Administrative Services to write a note on the case to be put to the full Committee; failing that, he explained, the Committee could not give the "preliminary opinion" required of it as an advisory body. In her reply of 24 February Mrs. Trolle said that the chairman had already been consulted and was in favour of termination. The same day the vice-chairman wrote back maintaining that according to Regulation 9 there still had to be a plenary meeting of the Committee.

In a letter of 24 February the Secretary General gave the complainant notice of termination at 10 April, releasing her from the duty to report for work after 10 March. His letter set out the reasons: though very good at preparing publications, she was tactless and clumsy in her dealings with others and poor at administrative work.

By a detailed memorandum of 8 March 1995 the vice-chairman told the head of Administrative Services that at a meeting on 6 March the Staff Committee had taken the view that the Administration had a duty to consult it under Regulation 9. He accordingly asked for further information and commented on the termination.

On 13 March the Secretary General rejected a request from the complainant for review of the decision not to confirm her appointment.

She appealed to the Appeals Board. In a report dated 9 August 1996 it concluded that the Secretary General's decision of 24 February 1995 to terminate her appointment showed neither formal nor substantive flaws and might stand.

On 2 September 1996 the Secretary-General gave her notice of his final decision to end her appointment.

2. The complainant seeks the quashing of the decisions of 24 February 1995 and 2 September 1996; material damages in an unspecified amount equivalent to the cost to her of the termination of her three-year appointment, viz. the sums that the Council should have paid her less her actual earnings in the remainder of the three-year period; 1 million Belgian francs in moral damages; interest at 10 per cent a year as from 11 April 1995 on those amounts; and costs.

She pleads as follows:

(1) The failure to consult the Staff Committee was in breach of Regulation 9.

(2) (a) She did not see the probation report of 22 February 1995 before the Secretary General took his decision of 24 February.

(b) She had restricted access to her personal file.

(3) Her probation was improper in that the Council did not let her have adequate support or give her due written warning.

(4) The termination was an unlawful exercise of discretion:

(a) Her supervisor did not have long enough to assess her before writing the probation report of 22 February 1995.

(b) She showed no serious shortcomings. Her difficulties were mainly the fault of colleagues or attributable to breach of duty by other officials.

The Council asks the Tribunal to dismiss her complaint and rebuts each of her pleas.

3. Regulation 9 reads:

> "(a) Officials shall be appointed for a fixed term or an indefinite term.
>
> (b) The first six months of service by an official shall be a probationary period. At the end of this period, the Secretary General shall decide:
>
> (i) to confirm the appointment; or
>
> (ii) exceptionally, with the consent of this official and after consultation with the appropriate advisory body, to prolong this probationary period for a further period of not more than six months; or
>
> (iii) after consultation with an advisory body, to terminate the appointment upon giving one month's notice or upon payment of one month's emoluments."

Staff Circular No. 136, which implements Regulation 9, provides:

> "Any actions taken under the terms of this Regulation shall be notified to the official concerned in writing. The appropriate advisory body to be consulted under (b) (ii) and (iii) shall be the Administration Committee in the case of an official in category A and the Staff Committee in the case of all other categories."

4. According to precedent a decision to end an appointment is a discretionary one and may be set aside only if it was taken *ultra vires* or shows a formal or procedural flaw or mistake of fact or law, or if some material fact was overlooked, or if there was an obviously wrong inference from the evidence or misuse of authority. The Tribunal will apply those criteria with even greater caution in reviewing the case of a probationer, else probation fails to serve as a period of trial. An organisation must be allowed the widest discretion in the matter and its decision will stand unless the defect is especially serious or glaring. What is more, where the reason for non-confirmation is poor performance the Tribunal will not replace the employer's assessment of the complainant with its own. See Judgments 1161 (*in re* Bouritsas), under 4; 1175 (*in re* Scotti), under 5; 1183 (*in re* Hernández Quintanilla), under 7; 1246 (*in re* Pavlova Nos. 1 and 2), under 3; 1352 (*in re* Offerman), under 12; 1386 (*in re* Bréban), under 17; and particularly 1418 (*in re* Morier), under 6.

5. As both parties acknowledge, the wording of Regulation 9 (b) (3) is plain: the decision to terminate an appointment at the end of probation may be taken only "after consultation with an advisory body", the Staff Committee.

But was the Committee's opinion properly sought and obtained in this case? On that score the parties disagree. The Council says that it need only speak to the chairman, such being its practice to date. The complainant demurs: the Committee should, she maintains, have met in plenary to take up the matter and make a recommendation. Although the chairman supported the Council's contention, a meeting of the members chaired by the vice-chairman preferred the complainant's.

Regulation 9 requires consultation of the Committee, and the Committee has several members who are supposed to function as a single body.

The Council's argument postulates prior delegation of authority to the Committee's chairman or officers. But to be valid such delegation must have some basis in the rules (so said Judgment 1477 (*in re* Nacer-Cherif), under 7). Failing that, any action will be *ultra vires*.

The Council cites no rule that allows the Committee to delegate authority. And the practice on which it does rely can have no effect in law. The conditions that make a practice an enforceable custom are not met. The alleged rule is not widely recognised as binding; indeed opinion varies on what it actually is.

So there was wrongful failure to consult the Staff Committee; the Secretary General was wrong to decide on the case before he had consulted it; and, in line with *patere legem*, the impugned decision and the others he took in breach of his duty to consult it must be set aside. Authority for that is to be found in Judgments 1488 (*in re* Schorsack), under 10; 1525 (*in re* Bardi Cevallos), under 3; and the others cited therein.

6. Since that plea succeeds there is no need to entertain the complainant's other arguments, which become irrelevant.

7. The complainant claims, not reinstatement, but compensation for any earnings she lost in the now expired period of three years following 11 April 1994, the date of her appointment. Since she had one year's probation on full pay, the loss she alleges was in the last two years of that period.

The Council was not free to end her appointment until it had consulted the Staff Committee and it did not consult the Committee within the three-year period. The parties have not argued the amount of her losses or of her actual or potential earnings in the last two years of the period. The Tribunal will therefore make her an award *ex aequo et bono*.

8. She claims moral damages on the grounds that "her workload was unduly heavy for almost a year, conditions were very distressing, she suffered nervous collapse and the termination harmed her professional and personal standing".

Article VII(1) of the Tribunal's Statute says that for a complaint to be receivable the internal remedies must be exhausted. So the Tribunal would not entertain any claim to damages that had no direct connection with the impugned decision. That decision being about termination, the only material issue is whether termination caused her actionable moral injury.

For want of consultation of the Staff Committee the decision is unlawful. But could the Committee have found in her favour and, if so, could that have swayed the Secretary General? It looks unlikely. And her other pleas do not warrant moral damages: she saw her file; the Council respected her right to a hearing or later made good any omission to do so; she got the probation report before probation expired; and the mere extension of probation was stark enough warning. Besides, she must have realised that while she was still on probation her position was precarious.

As was said in 4 above, the Secretary General has wide discretion in the matters of confirmation of the complainant's appointment. Had he decided against it even after going through the proper procedure, he could hardly have been accused of abuse of discretion. His first duty is to safeguard the Council's interests. Having found that the complainant got on badly with other staff, he was free to conclude that it was in the Council's interest to let her go even if she was not the only one at fault nor even mainly to blame.

9. The upshot is that the Council shall pay her damages for both material and moral injury in the amount of one year's pay at the rate applicable to her last month on actual duty, plus interest to be reckoned at the rate of 8 per cent a year as from 28 November 1995, the date at which she filed with the Appeals Board the brief in support of her internal appeal.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The Council shall pay her damages to be reckoned as set out under 9 and interest thereon at the rate of 8 per cent a year as from 28 November 1995.
3. It shall pay her 100,000 Belgian francs in costs.
4. Her other claims are dismissed.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

MICHEL GENTOT JULIO BARBERIS JEAN-FRANÇOIS EGLI

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-FOURTH SESSION

***In re* Malhotra (Ramesh Kumar) (Nos. 3 and 4)**

Judgment 1697

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr. Ramesh Kumar Malhotra against the World Health Organization (WHO) on 3 January 1997, the WHO's reply of 14 April, the complainant's rejoinder of 19 May and the Organization's surrejoinder of 27 August 1997;

Considering Mr. Malhotra's fourth complaint against the Organization which he filed on 16 January 1997, the WHO's reply of 23 April, the complainant's rejoinder of 28 May and the Organization's surrejoinder of 5 September 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the cases and the pleadings may be summed up as follows:

A. The complainant, an Indian born in 1935, is a former official of the WHO who retired at the end of November 1995. Details of his career in the Organization's Regional Office for South East Asia (SEARO), at New Delhi, appear under A in Judgment 1471 on his first complaint.

These complaints are about the rejection of his candidature for two vacancies in SEARO, both for posts of administrative assistant at grade ND.8. His third complaint concerns post No. 5.0028, which the Organization put up for competition by a notice of vacancy, No. 92/55, issued on 18 December 1992. The complainant applied and was among six internal candidates who were interviewed. The Regional Personnel Officer later put his name and two others on a short list which went to the ad hoc Selection Committee. By a letter of 18 March 1993 the Administration told him he had not been successful. On 17 May 1993 he filed an appeal with the regional Board of Appeal against non-selection. In its report of 18 April 1994 the regional Board said that it lacked the information it needed to make a "specific recommendation regarding the competitiveness of the candidates". Following the precedent in Judgment 1372 (*in re* Kashmiri Lal Malhotra) of 13 July 1994, the Organization sent the case back to the regional Board and made available to it the records of the Selection Committee's proceedings. In its second report, of 11 May 1995, the regional Board recommended rejection.

Mr. Malhotra's fourth complaint is about the rejection of his application for post No. 5.0895, which the WHO declared vacant by notice 94/03 of 21 February 1994. He was one of eight candidates who were interviewed. Again his name was put — with two others — on a short list that was submitted to the Selection Committee. On 22 July 1994 he learned that the Regional Director had picked someone else, and on 11 August 1994 he filed a further appeal with the regional Board. In its report of 15 May 1995 the Board recommended rejection.

By a decision of 25 May the Regional Director endorsed both of the Board's recommendations.

On 27 June 1995 the complainant went to the headquarters Board of Appeal. In a single report of 19 September 1996 it recommended rejecting his appeals. By a letter of 21 October 1996, which he impugns, the Director-General endorsed the recommendation.

B. The complainant submits that the impugned decision is tainted with procedural and substantive flaws. He says that the WHO failed in its duty under Staff Regulation 4.2 to secure the highest standards of efficiency, competence and integrity. He charges the Organization with overlooking his seniority and better qualifications and with personal prejudice against him. In his third complaint he contends that the absence of a staff representative on the Selection Committee was a fatal procedural flaw. In his fourth complaint he observes that he was better qualified than the successful candidate, who was "unfit for promotion".

He asks the Tribunal to quash the appointment of each of the two successful candidates and declare him "selected" for post 5.0028 as at 14 August 1992 and for post 5.0895 as at 1 August 1994. He seeks awards of 50,000 United States dollars in moral damages in his third complaint,

$75,000 in his fourth and of such other compensation "as may be admissible". He claims costs.

C. In its replies the WHO contends that the complaints are devoid of merit. It says that it followed the right procedure and took full account of the complainant's application but found others more suitable. It committed no breach of the rules. Nor did it overlook his many years of service. The rules do not require that a staff representative take part, however regrettable the absence of one on the Selection Committee may have been. The Organization denies that any of its officials showed personal prejudice against the complainant.

D. In his rejoinders he presses his plea of personal prejudice and insists that he was the better candidate in both competitions on the score of seniority, performance and experience. Abiding by Regulation 4.2 would have meant choosing him. In any event it was the Programme Director of the receiving unit who should have held the interviews for post 5.0895, not the Regional Personnel Officer.

E. In its surrejoinders the WHO presses its earlier pleas and answers several issues raised in the rejoinders. Under the rules on recruitment and selection either the Programme Director or his "nominee" may conduct interviews.

CONSIDERATIONS

1. These cases concern appeals by the complainant against his non-selection for two posts, No. 5.0028 and No. 5.0895, advertised for administrative assistants in the World Health Organization (WHO) at its Regional Office for South East Asia (SEARO).

2. The ad hoc Selection Committee made recommendations for both posts. The complainant appealed both decisions to the regional Board of Appeal, which in May 1995 dismissed both appeals in two separate decisions. However, when the complainant appealed the Board's decisions to the headquarters Board of Appeal it dealt with both appeals in the same report, recommending their dismissal. Since both cases raise the same points it is convenient to deal with them together.

3. Regarding appointments and promotions, the fundamental regulation that both parties rely on is Article 4.2 of the Staff Regulations, which states:

> "The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity. Due regard shall be paid to the importance of recruiting and maintaining the staff on as wide a geographical basis as possible."

4. The complainant's experience before applying for the two posts at issue is relevant. He was recruited in December 1967 as secretary and shorthand typist at grade ND.5 and moved his way up the ranks through various units in Health Services. After a number of awards and meritorious salary increments he ended up in the post of administrative assistant at grade ND.7 in SEARO's Personnel Unit, beginning in October 1986.

5. Post No. 5.0028, for an administrative assistant at grade ND.8 in the Personnel Unit of SEARO, was advertised in December 1992. The complainant was one of six internal applicants interviewed for the post, but he was not selected. One of the other applicants was successful. The third complaint is about the filling of post 5.0028.

6. Post No. 5.0895, also for an administrative assistant at grade ND.8 in the Personnel Unit of SEARO, was advertised in February 1994. The complainant was one of eight internal applicants interviewed for the post, but again another candidate was successful. The fourth complaint deals with the filling of post 5.0895.

7. In both cases the Regional Personnel Officer received and reviewed the application forms for the posts. He also sat on the Selection Committee as the personnel officer required by SEARO's "Recruitment and Selection Procedures" established by its memorandum of 27 December 1990 as from 1 January 1991 (the "Selection Procedure").

8. In both cases the Regional Personnel Officer placed the complainant on a short list of three applicants for review by the Committee.

9. Contrary to the Selection Procedure, no staff representative sat on the Committee that recommended the selection for post 5.0028. Apparently the Staff Association (whose representative would normally sit on the Committee) was protesting against the Administration's guidelines for the composition of the Committee.

10. The Tribunal has identified the following issues:

(i) Personal prejudice: Is there any evidence of prejudice against the complainant?

(ii) Consideration of facts: Did the Selection Committee properly consider all the relevant facts?

(iii) Selection procedure: Was the selection process properly implemented in accordance with the then current Selection Procedure?

Personal prejudice

11. The thrust of the complainant's argument is that because he did not withdraw his appeal against his earlier non-selection for post 5.0013 the Personnel Officer was prejudiced against him. He also argues that the Personnel Officer exerted pressure on him to withdraw his appeal regarding post 5.0013 and later post 5.0028. There is no credible evidence to support these allegations, which are denied by the person concerned.

12. To support his plea of prejudice, the complainant has asked the Tribunal to review the performance appraisal reports of himself and the candidates selected for the two posts. He asserts that his appraisals are much better than those of the selected candidates and that only prejudice can explain his non-selection. Accordingly, the Tribunal has conducted a review of the appraisal reports of the complainant and the two successful candidates. This review leads the Tribunal to conclude that the complainant's allegation is unfounded.

13. There is no other evidence supporting his plea under this heading.

Consideration of facts

14. The complainant makes a number of arguments in support of his allegation that the Selection Committee failed to consider all the relevant facts.

15. First, he says that the candidate selected for post 5.0895 did not meet the requirements because he did not have experience in personnel matters.

16. The notice of vacancy specified that experience in personnel or related areas was preferred but not required. Furthermore, the candidate selected for the post had been an administrative assistant in the Regional Office and in that post had gained experience in a related area and been exposed to personnel matters.

17. Secondly, the complainant says he had an excellent service record that was not taken into account.

18. The Tribunal, after reviewing the file and in particular the reports of the two appeal boards, finds that the complainant's excellent service to the WHO was taken into account and given due weight.

19. Next, it is argued that the WHO was never able to prove in what way the complainant was inferior to the selected candidates.

20. In the Tribunal's view, there is no obligation for the WHO to prove that the complainant was inferior to the selected candidates. It is for the complainant to prove his allegations and he has failed to do so.

21. Finally, the complainant argues that, all other things being equal, the complainant's seniority should have caused him to be selected.

22. The Tribunal reiterates its oft-stated position that, while seniority is a consideration, it is not the paramount one: see Judgment 564 (*in re* Ali Khan) under 8.

23. Furthermore, it is clear that in the Selection Committee's view all other things were not equal. Even after giving due consideration to the complainant's seniority the Committee found the selected candidates to be superior. The complainant has not shown this conclusion to be wrong.

24. It is not the role of the Tribunal to substitute its opinion for that of the Committee. The Tribunal will review the comparison of candidates only when it appears that the Committee's choice rests on a mistake of fact or law or that there has probably been an abuse of authority: Judgment 1436 (*in re* Sala No. 2) under 6. There is no persuasive evidence to support such a finding in this case.

Selection procedure

25. There are two aspects to this question. The first deals with the role of the Regional Personnel Officer in both competitions. The complainant maintains that his participation was improper.

26. According to the Selection Procedure the "Programme Director of receiving unit or his nominee will review the applications, interview the candidates and prepare a short list". The Regional Personnel Officer was the Programme Director's nominee in this case. Also according to the Selection Procedure, the personnel officer must sit on the Selection Committee. The Regional Personnel Officer did so.

27. In the Tribunal's view his involvement in the process was in full compliance with the Selection Procedure. The Tribunal has already indicated that allegations of personal prejudice are not supported by the evidence.

28. The second aspect of this question is the absence of a Staff Association representative on the Committee in the process of selection for post 5.0028.

29. The Selection Procedure states that the Selection Committee "will be composed" of five members including "(d) Staff Association's President or his nominee".

30. The complainant argues that the absence of a staff representative rendered the selection procedure unlawful. It is clear that the President of the Staff Association was invited but for reasons with which the Tribunal is not concerned chose neither to attend nor to send a representative. As the Tribunal ruled in Judgment 1565 (*in re* Kashmiri Lal Malhotra No. 6) under 8, this fact "cannot have the effect of invalidating the recommendations" of the Committee.

31. In summary, the allegations regarding personal prejudice are not supported by any evidence. The complainant's argument that the Selection Committee did not consider all the relevant facts is unfounded; the evidence shows that the Committee reviewed the qualifications, experience and seniority of the short-listed applicants before deciding who had the highest merit. Finally, the Selection Procedure was properly implemented; the Staff Association's refusal to participate cannot prevent the selection of candidates.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

Mella Carroll

MELLA CARROLL

MARK FERNANDO

JAMES K. HUGESSEN

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-FOURTH SESSION

***In re* Mitastein (No. 3)** **Judgment 1698**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mrs. Monique Mitastein against the Pan American Health Organization (PAHO) on 19 September 1996 and corrected on 2 December, the PAHO's reply of 28 March 1997, the complainant's rejoinder of 11 June and the Organization's surrejoinder of 17 September 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Details of the complainant's career in the PAHO are set out under A in Judgments 1045 and 1293, on her first two complaints. Like them, this complaint is about the application to her of the Organization's "reduction-in-force" procedure.

By Judgment 1045, of 26 June 1990, the Tribunal quashed a decision to terminate her appointment and ordered the PAHO to apply the procedure in accordance with Rule 1050.2, which reads:

> "When a post of indefinite duration - or any post held by a staff member with a career-service appointment - comes to an end, a reduction in force shall (if the post was filled) take place, in accordance with procedures established by the Director ..."

On 6 August 1990 the Director of the PAHO set up an "Ad Hoc Committee on Reduction in Force" and in a report of 14 December 1990 the Committee recommended putting her on one of two posts it identified as suitable. But on 26 December the chief of Personnel gave her notice of termination at

31 March 1991. By Judgment 1293, of 14 July 1993, the Tribunal set aside the notice of termination and ordered the PAHO to reconvene the Committee or, failing that, carry out a new reduction-in-force procedure.

On 28 January 1994 the Committee submitted a report on her suitability for retention in the "occupational group" of her former post, that of "training specialist/fellowship administrator". The majority concluded that, failing to meet the "minimum qualifications", she "could not compete" for any of the four positions of technical officer in the group. Two of the five members took the view that she did have the minimum qualifications for two of them and should be put on post 3488. By a letter of 16 February the chief of Personnel, having endorsed the recommendation of the majority, invited her to say whether she wished to compete for posts in a different occupational group under Manual paragraph II.9.360. By a letter dated 28 February she announced her wish to compete for posts in other groups, namely translators, social scientists and information experts.

Though the Committee accordingly examined her suitability for posts in those groups, it reported on 4 April 1994 that she was not eligible for any of them. By a letter of 4 May the chief of Personnel told her that the Director had decided to endorse the Committee's recommendation and gave her notice of termination at 11 August 1994.

On 3 October 1994 the Administration got notice of her intent to appeal. In light of the Tribunal's reasoning in Judgment 1371 (*in re* Ortiz), of 13 July 1994, the chief of Personnel told her by a letter of 8 November 1994 that the PAHO was reinstating her as at 12 August 1994 and that the Committee would examine her position anew. Having done so, it recommended termination in a report dated 11 November 1994 on the grounds that she was ineligible for a post of translator or social scientist. By a letter of 23 November 1994 the chief of Personnel told her that the Director had endorsed the Committee's recommendation and gave her notice of separation as at 28 February 1995.

In a report dated 16 April 1996 the headquarters Board of Appeal recommended rejection by 4 to 1. By a letter of 20 June 1996 the Director endorsed the Board's recommendation. That is the decision she impugns.

B. The complainant submits that the reduction-in-force procedure is tainted with a fatal flaw in that the Committee made an "error of fact" by extending the minimum requirements that appeared in the notice of vacancy for post 3488. Although, as the minority report concluded, she met the minimum requirements in that notice, the majority mistakenly treated as minimum requirements further qualifications set out in the post description.

Vacancy notices are drawn up by the Personnel Department with the approval of the chief of Personnel after the classification unit has reviewed the post description. There being no evidence that the Department erred in drawing up the vacancy notice, she observes that it does not describe as incomplete the list of minimum requirements though it did say the list of duties was a "sample". There would have been no point, she contends, in publishing an incomplete or expandable list of "minimum" requirements. As the minority report stated, the published list is the official interpretation of the required qualifications. What is more, the majority were demanding the sort of knowledge that was found only in reference books. In any event the guidelines for the reduction-in-force procedure require the Committee to take account of the candidate's potential as well as actual ability to do the job. Why, she asks, should a vacancy notice, which states the requirements that apply under the normal selection procedure, be swept aside in a reduction-in-force procedure, the purpose of both procedures being the same?

She wants the Tribunal to order her reinstatement as from the date of dismissal and to have the reduction-in-force procedure "repeated". She also claims costs.

C. In its reply the Organization refutes her pleas and argues that she was not qualified for the material post. It says that a post description is the only authoritative statement of the minimum requirements and that the reduction-in-force committee had no reason to take account of the vacancy notice. Though a notice may be lacking, a post still requires qualifications. The "purpose, content, duration and applicability" of a vacancy notice are limited, whereas the post description applies in full. Though the complainant lacked the special knowledge required in the description of post 3488, the Tribunal does not rule on the relevance of particular job requirements. Whatever her potential for a job may be, she must first meet the minimum requirements. But even if she had met them, it is not a foregone conclusion that she would have won the competition. Her record for the years 1981-82 and 1983-84, the last on which she got performance appraisals, was not so good as the incumbent's for 1992-93 and 1993-94.

D. In her rejoinder the complainant seeks to rebut the Organization's reply. She is not asking the Tribunal to set aside the post description; she merely wants it to declare unlawful the PAHO's treating certain qualities described as merely "desirable" in the post description as "minimum requirements" and order the Organization to abide by the minimum requirements announced in the notice. Were the post description the only authoritative source of the minimum requirements for a post, the Tribunal would not have ruled in Judgment 1497 (*in re* Flores) that the "basic rule" of selection is that the chosen candidate must have all the minimum qualifications "in the notice of vacancy". Ignoring the complainant's progress in the Organization from grade G.7 to P.3, the PAHO relies on two performance appraisals to show that she should not have won the competition for "retention" But the material issue is whether she might compete, not whether she would win. She presses her claims.

E. In its surrejoinder the Organization says that the rejoinder does not raise any new substantive issues. It points out that she produces no evidence to show that the minimum requirements are "exclusively" set in the vacancy notice. Indeed the majority of the Committee properly assessed her qualifications against the applicable requirements and found her unsuitable.

CONSIDERATIONS

1. This complaint arises out of a reduction-in-force procedure carried out by the complainant's employer, the Pan-American Health Organization (PAHO). The most important questions raised concern the qualifications required for two posts 3488 and 3598. The reduction-in-force committee held by a majority that the complainant did not meet the minimum qualifications for the posts, which were accordingly removed from the list of those for which she was being considered. That decision was confirmed by the Director of the Organization on the recommendation of the headquarters Board of Appeal, and the complainant is appealing against it to the Tribunal.

2. The first question is to identify the proper source document or documents from which the essential or "minimum" qualifications or requirements are to be drawn. The descriptions of posts 3488 and 3598 are identical. The complainant argues that the minimum requirements should be determined not from the post description but rather from a vacancy notice which lists them under that rubric. The Organization, on the other hand, takes the position that the reduction-in-force committee was correct in looking beyond the vacancy notice and referring to the official post

description in determining that the complainant did not have all the essential qualifications for the job.

3. A comparison of the two documents reveals as follows.

4. In the post description box 5 contains the heading "What are the minimum knowledge requirements of the post?". It goes on to list certain educational, work experience, and language requirements, all of which are susceptible of relatively objective measurement. The same qualifications also appear, although in slightly different form, in the vacancy notice under the heading "Minimum requirements".

5. Box 6 of the post description is headed "Work role and skills required". It sets out rather "softer" qualifications which lend themselves somewhat less to objective measurement. Its content is also echoed in the "Minimum requirements" section of the vacancy notice as follows:

> "Skills:
> post requires the exercise of independent judgment in analyzing educational and training needs of professionals in the medical, health and related fields in the context of the health programs of Member Countries. The incumbent is responsible for directing the technical, logistical, budgetary and financial aspects of individual and group fellowships. Good interpersonal skills are needed to counsel Fellows in cross-cultural exchange programs on educational and cultural matters."

6. Finally, box 7 of the post description is headed "What subject areas or fields of work does the post cover and to what degree is specialization in them required?". The text reads as follows:

> "Detailed knowledge of educational systems and admissions requirements of institutions in the United States and Canada and of academic requirements worldwide and their educational equivalencies. Detailed knowledge of health agencies and training facilities in the USA and Canada and ability to evaluate relevance of their activities in cross-cultural training. Management and multiple activities involving individuals and groups from various cultures and political systems. General knowledge of a wide range of subject areas related to human and animal health."

7. The contents of box 7 have no counterpart in the vacancy notice. The majority of the committee found that these qualifications constituted "minimum" requirements for the post and that the complainant did not have them.

8. In the Tribunal's opinion the concept of "minimum" requirements or qualifications is not helpful. A particular qualification is either required

or it is not. Certain qualifications or skills may be essential for a given post while others may be merely desirable. Presumably it is the former which are intended to be designated by the use of the terms "minimum" requirements or qualifications.

9. Moreover, there can be no doubt that the only official source of information about the qualifications required for any particular post must be the post description relating to it. A vacancy notice is only a secondary or derivative source and represents a synopsis of the post description. While it must not include any qualifications which are not required, since to do so might exclude eligible candidates, it may leave out certain qualifications which are in fact required. There need not even be a vacancy notice for every post and the purpose of the notice is to attract suitable candidates rather than to provide a checklist of the qualifications required. As the Tribunal said in Judgment 1386 (*in re* Bréban) under 19, albeit in a different context:

> "... since the notice had to be in general enough terms to attract a wide variety of applicants it cannot be regarded as a specific enough job description to be of use to the official."

10. The Tribunal also notes that a vacancy notice, even where one exists, is necessarily a document whose validity is limited in time by the closing date of the particular competition which it announces. Thus the vacancy notice relied on by the complainant in the present case is dated 28 August 1990 and sets the closing date at 25 September; the committee's finding that the complainant was unqualified was dated 28 January 1994, almost three and a half years later. The requirements of any post may of course change over time. Even though the qualifications at issue here did not actually change, the fact that they might have done so is an indication that a vacancy notice is not a proper source document to establish all the required qualifications for a job. Furthermore, since the appraisal of performance is based on the post description, that document is authoritative.

11. Once it is determined that the proper document to refer to is the post description and nothing else, the second question raised in this case is the proper means of deciding which of the qualifications listed are essential and which are not. In this connection, the use of words such as "requirement", "required" or "minimum" furnishes some indication but is not an infallible guide. The proper approach is to examine the post

description in its entirety and to determine from the words used and their context which of the qualifications are essential and which are not. This was substantially the approach taken by the majority of the committee, and it was correct. Box 7 refers to the degree of specialisation required, including detailed knowledge of education systems and health agencies and general knowledge of health and health-related subjects. From the language employed such knowledge is clearly required for the post. The qualifications listed are essential and not merely desirable. The committee was correct to ask itself if the complainant met them.

12. Before closing, two subsidiary arguments raised by the complainant should be mentioned:

(a) it is suggested that the contents of box 7 of the post description are not in fact required for the post in question;

(b) it is suggested that the complainant actually meets the requirements and has the qualifications mentioned in box 7.

13. Neither of these two questions is a matter upon which the Tribunal is competent to rule. In the absence of some procedural flaw or an allegation of abuse of authority — and there is none — the Tribunal will not substitute its judgment on these matters.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

Mella Carroll

MELLA CARROLL

MARK FERNANDO

JAMES K. HUGESSEN

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

EIGHTY-FOURTH SESSION

***In re* Halloway** **Judgment 1699**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Stephen Halloway against the United Nations Industrial Development Organization (UNIDO) on 21 August 1996 and corrected on 1 October, UNIDO's reply of 9 January 1997, the complainants rejoinder of 12 March and the Organization's surrejoinder of 19 June 1997;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of the United States who was born in 1946, joined the staff of UNIDO on 29 April 1990 under a fixed-term appointment for two years as the Director of its Office in New York at grade D.1. UNIDO extended his appointment by two years on 29 April 1992.

In a memorandum of 25 February 1994 a personnel officer gave him information about his terminal entitlements on the expiry of his appointment on 28 April 1994. By a fax of 28 February he told the Director of the Personnel Services Division that the memorandum of 25 February was not in line with the drift of talks he had been having with the Director-General about keeping him on from the expiry of his old appointment until the start of a new one. By a memorandum of 7 April 1994 the Director informed him that the Director-General had granted him a "final" three-month extension of appointment. On 29 July 1994 he got a two-month extension. By a memorandum of 15 September the Director informed him that the Director-General had decided to extend his appointment by another month, until 28 October 1994: the extension would be "final" unless "in the meantime, or shortly thereafter" the Government of Jamaica approved his candidature for the post of Director of the UNIDO Office in that country.

By a fax of 23 October 1994 he asked the Director-General to extend his appointment on account of the delay in getting clearance from Jamaica. By a fax dated the 28th the acting chief of the Personnel Administration and Social Security Section informed him that he would get a one-month extension of appointment from 29 October on special leave without pay. By a memorandum of 28 October to the Director-General the complainant said that, since his assignment to Jamaica was "proceeding", he wanted review of the decision to put him on special leave without pay. By a memorandum of 4 November the complainant asked the Director-General to act on a request he had made on 24 September 1993 for an investigation into the conduct of another official; he also asked, in order to safeguard his rights, to be assigned to an appropriate position while the matter was pending.

By a letter of 29 November 1994 the Director-General told him that since the Jamaican Government had rejected him UNIDO would have to let him go and, in answer to his request for an investigation that two internal audits had not revealed "any breach of conduct".

In a memorandum of 12 December 1994 the complainant asked the Director-General to keep him on special leave without pay from 1 December 1994 until 30 April 1995 to improve his chances of getting work elsewhere and to let him have the minimum of five years' participation in the United Nations Joint Staff Pension Fund that would qualify him for a pension. On 15 February 1995 the complainant signed a letter of appointment extending his special leave from 29 November 1994 to 30 April 1995 "for the sole purpose of enabling him to pay all relevant contributions" into the United Nations Joint Staff Pension Fund: it carried "no expectancy of renewal".

In a letter of 21 April 1995 the complainant said that the "misfeasance, nonfeasance and malfeasance" of senior officers had frustrated his expectations of another assignment and he asked for a suitable appointment. In a reply of 30 May the Director-General referred to his letter of 29 November 1994 and to the memorandum of 15 September from the Director of Personnel Services and told him to complete the formal arrangements for termination.

By a letter of 20 July 1995 to the secretary of the Joint Appeals Board he appealed against the Director-General's decision of 30 May. In its report of 22 April 1996 the Board recommended rejecting his appeal as time-barred. In a letter of 20 May 1996 the secretary informed him that the

Director-General had decided to endorse the Board's recommendation. That is the decision he is impugning.

B. The complainant submits that his internal appeal was not time-barred: the "final" decisions he had received before the letter of 30 May 1995 were superseded by further extensions of his appointment. Not until he got the decision of 30 May did he have reason to doubt that the Director-General would settle the matter by offering him reassignment. Like the requests for review he had submitted earlier, his appeal was timely.

He pleads discriminatory treatment and procedural flaws. The Administration bungled his nomination to the post in Jamaica; its refusal to let him go back to his vacant post in New York or consider him for another was in breach of good faith. It was not he who first applied for special leave: his agreement to the letter of appointment putting him on special leave and his later application for the extension of it were extorted under duress. Not until long after his departure did he get an appraisal of his performance in his last year and it was not made in keeping with the rules. And not until he had gone did UNIDO act on his request for investigation into unfair treatment by his former supervisor.

He seeks reinstatement; payment of salary and entitlements for the time he spent on special leave without pay; and the equivalent of three years' pay in damages. He claims 7,500 United States dollars in costs.

C. In its reply the Organization argues that the complaint is irreceivable. The Director-General gave him in the letter of 29 November 1994 an explicit decision not to extend his appointment and that decision never changed. The grant of his application for an extension of special leave to allow his pension entitlement to accrue affords no basis in law for waiver of the time limit. So his appeal of 20 July 1995 was time-barred.

On the merits UNIDO denies his charges of discriminatory treatment and procedural flaws. The decision not to extend his fixed-term appointment was a proper exercise of discretion. The Organization did its utmost to appoint him to the post in Jamaica, and while the matter was pending it agreed to extend his appointment on special leave. Since he failed to discuss his last performance report with his supervisor while in Vienna, it would have been too costly to bring him back from the United States just for that purpose. As for his allegations of improper treatment on the part of his supervisor, he had only to put the matter to the Panel on Discrimination and Other Grievances instead of keeping it to himself for eleven months.

D. In his rejoinder the complainant maintains that his complaint is receivable: not until his appointment actually ended did the decision to separate him from service become final. Like several others before it, the "final" decision of 29 November 1994 was changed to allow him five more months' special leave. In any event it would be wrong to penalise him for trying to settle a dispute amicably. He charges the Director-General with misusing his authority in order to get rid of him.

E. In its surrejoinder the Organization presses its pleas on receivability and insists that the letter of 30 May 1995 was "purely confirmatory". There was nothing improper in the decision not to extend his appointment. Nor has he adduced any evidence of misuse of authority.

CONSIDERATIONS

1. The complainant entered the Organization's service on 29 April 1990 as the Director of its Office in New York. He got a contract for two years and then for another two. A personnel officer informed him on 25 February 1994 that his fixed-term contract would expire on 28 April 1994.

2. At that time negotiations on further employment for him were in progress. He was given on 7 April 1994 a three-month extension and on 29 July a further extension of two months, until 28 September.

3. On 26 August the Director of Personnel Services submitted to the resident representative of the United Nations Development Programme (UNDP) in Jamaica the complainant's candidature for the post of country director of UNIDO in Kingston, where he was to cover other Caribbean countries as well.

4. A memorandum dated 15 September told him he was to have another one-month extension to 28 October and said:

> "It is understood that this is a final extension unless in the meantime, or shortly thereafter, confirmation is received from Kingston concerning your acceptance for the ... post in Jamaica. In the event that this confirmation is received at a later date, it would be subject to a new letter of appointment."

5. On 26 September the resident representative in Kingston informed the Director of Personnel Services that he was still awaiting a reply from the Jamaican Government.

6. In a memorandum of 23 October to the Director-General the complainant asked for an appropriate extension of contract until the matter was final so that he would have no break in service.

7. On 28 October the Organization decided to extend his appointment by one month as from 29 October and to put him on special leave without pay in that period; it would be making no payments for him to the United Nations Joint Staff Pension Fund or to the health insurance fund; but he could make payments himself.

8. By a memorandum dated 4 November 1994 to the Director-General he repeated a request he had made on 24 September 1993 for investigation into the conduct of a supervisor, whom he named, and asked to be kept on in the Organization in the meantime.

9. By a fax message dated 28 November the resident representative reported to the Director of Personnel Services that the Jamaican Government had informed him officially that UNIDO should suggest other candidates.

10. In a letter of 29 November the Director-General reviewed the complainant's "contractual status in the course of this year" and informed him that the Jamaican Government had not accepted his candidature and he would have to go. The Director-General said that the correspondence concerning the complainant's supervisors had not affected that decision.

11. In a memorandum of 1 December to the Director-General the complainant objected to the handling of his case, said he did not intend to let matters rest there and sought a discussion with the Director-General. In a letter dated 2 December the Director-General explained the procedure adopted and stated that since he had not been selected for the post in Kingston no further extension of his appointment could be justified.

12. On 12 December the complainant wrote to the Director-General asking that his special leave without pay be extended to 30 April 1995. The reasons he gave were:

(i) By retaining his status as a United Nations employee he would be "able to be considered for positions posted for internal recruitment" within the United Nations system.

(ii) He could also be considered for employment with another United Nations agency otherwise than by competition, i.e. by transfer.

(iii) He could complete five years' participation in the Pension Fund.

13. The Managing Director of the Division of Administration replied on 21 December 1994 that the Organization "would in principle be prepared to consider" his request further but suggested he ask the Pension Fund about his pension benefits. The complainant confirmed on 23 January 1995 that he had consulted the Fund and he again asked for the extension of his special leave. A letter of appointment dated 7 February 1995 granting him such extension made it subject to the following condition:

> "At the request of Mr. H. Stephen Halloway, this appointment is granted to him on special leave without pay for the sole purpose of enabling him to pay all relevant contributions into the United Nations Joint Staff Pension Fund ... It carries no expectancy of renewal or of conversion to any other type of appointment in the Secretariat of UNIDO."

The complainant signed that letter on 15 February 1995.

14. After some correspondence he wrote on 21 April 1995 to the Director-General contending, among other things, that there had been "ongoing negotiations concerning his next assignment" in UNIDO and that "administrative irregularities" had "undermined" his assignment to Jamaica. He set out his version and maintained that the matter of his next assignment remained unresolved. He sought an answer by 30 April and reserved the right to follow the procedures in Staff Rules 112.02 and 112.03 and Appendix K to the Rules.

15. The Director-General replied on 30 May 1995. He said that his letter of 29 November 1994 had explained the complainant's contractual status in 1994. He reminded the complainant that as a holder of a fixed-term appointment he had no expectations of renewal and that he had got the special leave without pay from 29 October to 28 November 1994 only pending a decision on his candidature for the post in Jamaica and then until 30 April 1995 at his own request and for the purposes of his pension; so he would now have to go.

16. The complainant submitted an appeal to the Joint Appeals Board on 20 July 1995 referring to the Director-General's letter of 30 May 1995.

17. The Board held that his appeal was not receivable. The memorandum of 15 September 1994 had, it held, contained an unambiguous administrative decision: the extension to 28 October 1994 was final unless he got the Kingston appointment. The Board said that the Director-General's decisions of 29 November and 2 December 1994 had amounted to review and confirmed the earlier one as final. In its view he should, in accordance with Rule 112.02(b)(i), have appealed against the decisions in the letters of

29 November and 2 December within sixty days of receiving the one of 2 December. Not having been submitted until 20 July 1995, his appeal was out of time. The Director-General's letter of 30 May 1995 had set off no new time limit since it had contained no new decision: it was mere repetition of the one already taken. Nor were there exceptional circumstances warranting waiver of the time limit. There was in particular no documentary evidence to suggest that negotiations had been continuing after the Director-General's letter of 29 November 1994: the unilateral proposals made by the complainant had not constituted negotiations.

18. The Board recommended that the Director-General "reject the appeal in toto". The Director-General endorsed its recommendation in a memorandum of 16 May to its secretary, who so informed the complainant in a letter of 20 May 1996. That is the decision he impugns. The relief he seeks is that the Tribunal declare the decision not to renew his fixed-term appointment to have been tainted with prejudice and procedural irregularities, to order his reinstatement and to award him consequential payment of salary and allowances for the period of his unpaid leave, together with damages and costs.

19. Rule 112.02 provides:

> "(a) A serving or former staff member who wishes to appeal an administrative decision under the terms of regulation 12.1, shall, as a first step, address a letter to the Director-General, requesting that the administrative decision be reviewed. Such a letter must be sent within 60 days from the date the staff member received notification of the decision in writing.
>
> (b) (i) If the staff member wishes to make an appeal against the answer received from the Director-General, the staff member shall submit his or her appeal in writing to the Secretary of the Joint Appeals Board within 60 days from the date of receipt of the answer;
>
> (ii) If no reply has been received from the Director-General within 60 days from the date the letter was sent to the Director-General, the staff member may, within the following 30 days, submit his or her written appeal against the original administrative decision to the Secretary of the Joint Appeals Board; alternatively, the staff member may, within the following 90 days apply directly to the Administrative Tribunal of the International Labour Organisation in accordance with the provisions of its Statute."

20. The complainant argues that he met all the applicable time limits in Rule 112.02 for requesting review and filing an appeal. He reasonably

believed, he says, that he was not free to appeal until he got the Director-General's reply of 30 May 1995 to his letter of 21 April asking that his status be resolved through reassignment; and he did appeal within sixty days of getting that reply. He said that for him to have appealed earlier would have prevented the negotiation of a settlement. He submits that several purportedly "final" decisions were superseded by further extensions and that according to the Board's reasoning he would have had to appeal against each of them in order to avoid the time bar. He cites precedent in support of the view that time limits are "not supposed to be a trap or a means of catching out a staff member who acts in good faith": Judgments 607 (*in re* Verron) under 8 and 1247 (*in re* Kurukulanatha) under 6. He submits that the decision to let him go was contingent on the Organization's being unable to reassign him and therefore did not become final until his contract had in fact ended.

21. The Organization submits in reply that the administrative decision not to extend the complainant's paid appointment was in the letter of 29 November 1994, that the grant of five months' special leave without pay afforded no grounds for his disregarding the time limit for appeal against that decision, and that the letter of 2 December 1994 was mere confirmation of it.

22. In accordance with the defendant's contention the Tribunal accepts the letter of 29 November 1994 as the final administrative decision not to renew the complainant's contract and to end his appointment after the expiry of one month's special unpaid leave. That being so, he should have sought review by the Director-General within the sixty days' time limit set in Rule 112.02(a). The Organization and the Joint Appeals Board have treated the Director-General's reply of 2 December 1994 to the complainant's memorandum of 1 December as the review of that decision. But in that memorandum the complainant did not ask the Director-General to review the decision in the letter of 29 November: he does not even mention it. He talks of the post in Kingston and of the solutions offered by him and says that before taking further action he would like to discuss matters with the Director-General so as to understand his position better.

23. That does not appear to be a request under Rule 112.02(a) for review of an administrative decision. While such a request does not have to take any particular form it should at the very least identify the administrative decision of which review is sought.

24. The conclusion is that the complainant made no request for review by the Director-General within the period of sixty days from notice of the decision in the letter of 29 November 1994 and therefore failed to meet the time limit for the first step in the internal appeal procedure. Nor would it help his case to treat the letter of 2 December as review by the Director-General under Rule 112.02(a). In that case the letter would have set off a time limit of sixty days for him to appeal to the Joint Appeals Board. No matter how his case is looked at he was out of time when he filed an appeal with the Board on 20 July 1995.

25. He is mistaken in his argument that time did not run until he got the Director-General's letter of 30 May 1995. That letter was mere repetition of the decision in the letter of 29 November 1994 and such repetition sets off no new time limit.

26. The separation of the complainant was not contingent on the Organization's failing to find him a new job. The Director-General's letter of 29 November 1994 was clear on that score:

> "As we have not received a positive decision on your candidature, I regret to inform you that the Organization has to carry out the usual separation formalities."

And again in his letter of 2 December 1994 the Director-General said:

> "the fact remains that you were not selected for the post and there the matter rests. Consequently, a further extension of your appointment cannot be justified."

In his letter of 30 May 1995 the Director-General referred to staff members who were granted appointments for a fixed term and said that such appointments did not carry any expectancy of renewal or of conversion to another type of appointment and that the complainant had been clearly informed of his contractual status by the memorandum of 15 September 1994.

27. The five months' extension of special leave without pay that the complainant was given at his own request did not affect the finality of the decision in the letter of 29 November 1994. The sole purpose of that extension was to enable him to complete five years' contributions to the Pension Fund.

28. The complainant submits that according to the Joint Appeals Board's reasoning he would have had to lodge an appeal against each

decision so as to avoid the time bar. That may be true, but it is a consequence of having time limits. Any staff member who has a purportedly final decision and fails to ask within sixty days for review but merely hopes it will be changed runs the risk of being time-barred. In this case some final decisions were changed within the sixty-day period; some were changed after it. But the relevant decision is the last "final" one that is not changed.

29. The Tribunal does not accept that a request for review precludes a negotiated settlement. There is no reason why a staff member cannot keep to the time limit laid down by the Staff Regulations and Rules and at the same time negotiate. And he will be in a stronger negotiating position if he has lodged a timely appeal.

30. Appendix K to the Staff Rules says under (k):

> "An appeal shall not be receivable unless the time-limits specified in paragraph (a) or (b) of staff rule 112.2 or 212.2 have been met or have been waived, in exceptional circumstances, by the panel constituted for the appeal."

31. The complainant argues that the Joint Appeals Board was wrong to find no exceptional circumstances warranting waiver of the time limit for appeal. Although such a ruling is discretionary it may not be based on misinformation or on ill-founded conclusions. The complainant says that the Board overlooked several facts, namely that the Director-General had extended his contract on several previous occasions, that the final decision on filling the post in Kingston had still not been taken by the end of 1994, and that he had originally been forced to accept special leave without pay while his assignment was still pending. He points out that although he proposed the continuation of his unpaid leave in lieu of separation he did so under duress and in the expectation of getting alternative employment without a break in service. He submits that it was not unreasonable of him to hope that UNIDO would alter its decision again. He attributes delay in the negotiations to the Organization's failure to complete before he had gone his performance appraisal and investigation into his charges of discriminatory treatment by his former supervisor. He maintains that his allegations of such treatment and of irregularities in procedures are well founded and that he was denied a hearing on the substance of those allegations.

32. There is no reason to find any flaw in the Board's ruling that there were no exceptional circumstances to warrant waiver of the time limit. That ruling rested neither on misinformation nor on ill-founded conclusions.

There was no evidence to suggest that there were any negotiations about paid employment still going on after the Director-General told him in the letter of 2 December 1994 that no further extension of his contract would be justified. There was no substance to his allegation that it was with a view to employing him again that he was put on special leave. The first time he was put on such leave was during the period when the result of his candidature for the Kingston post was unknown. The second time he was granted the leave it was at his own request and so as to enable him to complete five years' contributions to the Pension Fund. It was after considering the other elements too of his contention that the Board decided that none of them warranted waiver.

33. The fact that he has had no hearing on the substance of his allegations is a consequence of his failure to observe the time limit: it affords no grounds for waiver.

34. The complainant failed to observe the time limit for internal appeal and the Joint Appeals Board cannot be faulted for ruling that there were no exceptional circumstances to justify waiver. It follows that his complaint is irreceivable under Article VII(1) of the Tribunal's Statute because he failed to exhaust the internal means of redress.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

Mella Carroll

MELLA CARROLL

MARK FERNANDO

JAMES K. HUGESSEN

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

EIGHTY-FOURTH SESSION

In re **Masens** **Judgment 1700**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Liana Yvonne Masens against the United Nations Industrial Development Organization (UNIDO) on 19 July 1996 and corrected on 1 October, UNIDO's reply of 9 January 1997, the complainant's rejoinder of 20 March and the Organization's surrejoinder of 25 June 1997;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of the United States who was born in 1934, joined UNIDO on 1 January 1968 on probation as a junior administrative assistant at grade G.5. On 1 August 1968 she got a permanent appointment. In 1970 UNIDO promoted her to grade P.1 as an assistant officer for industrial development. By the time of her retirement, on 31 August 1994, she was an industrial development officer and held grade P.4.

By a memorandum of 4 October 1993 the Director of the Personnel Services Division informed her that to save money UNIDO had to reduce staff and was likely to be ending her appointment in the "near future". In a memorandum of 6 October she asked the Director to state the criteria for retrenchment and said she would accept redeployment.

In a memorandum dated 2 November 1993 the Director notified to her the Director-General's decision under Staff Rule 107.02(a) to put her on special leave with full pay from 1 January 1994 until the due date of her retirement, the end of August 1994. In a memorandum also of 2 November to the Director-General she claimed financial compensation for chronic deafness in one ear, improper treatment by another staff member, discrimination and mistakes in the reckoning of pension entitlements. In a letter dated 15 November the Director-General replied that he had taken "due note" of her "concerns" and assured her that it was the need to clear posts by the end of the biennium that had led to his decision to put her on special leave with full pay. In a letter of 14 December 1993 she told him she was declining the Director's offer of 2 November on financial grounds and because of the "strange" circumstances in which it had been made.

By a memorandum of 13 January 1994 she told the Director-General that she was claiming the "right to appeal" against his decision though she would wait until 28 January for a reply from the Director of Personnel Services to questions she had put in her letter of 14 December 1993. After speaking to her the Director replied in a letter dated 11 February 1994. In a letter to him of 1 March she said that she was still waiting for a reply from the Director-General to her appeal and again sought review of the decision to put her on special leave. In a letter of 22 April the Director gave her information about her financial position and entitlements; as to her appeal he merely referred her to the relevant provisions in the rules.

On 27 April she saw the Director-General. The same day she sent him a note saying she had not agreed to go on special leave with full pay and asking for a "golden handshake" instead. By a letter of 18 January 1995 she reminded him that she was still waiting for a reply. By a letter of 28 February he said he had reviewed the issues once again and was satisfied that his decision to grant her special leave with full pay had neither caused her financial loss nor impaired her entitlements.

By a letter of 27 April 1995 to the secretary of the Joint Appeals Board she appealed against the letter of 28 February 1995. In its report of 25 March 1996 the Board recommended rejecting her appeal as time-barred.

In a letter of 23 April 1996 the secretary of the Joint Appeals Board sent her a copy of the Director-General's decision of 19 April 1996 to endorse the Board's recommendation. That is the decision she is impugning.

B. The complainant submits that the rejection of her internal claims was unlawful. She alleges mistakes of fact and law. On 13 January 1994 she had sought review of the decision of 15 November 1993 within the 60-day time limit set in Staff Rule 112.02(a). The Director-General's decision to see her on 27 April 1994 was a positive reply within the meaning of 112.02(b)(ii) to her request for review and it was proper for her to await his final decision of 28 February 1995 before lodging her appeal.

On the merits she contends that the decision to put her on special leave with pay without her consent offended against Rule 107.02(a), which says that such leave may be granted, not imposed. Besides, none of the conditions for the grant of special leave was met. Though the lack of money that the Director-General pleaded might indeed have warranted termination, he failed to abolish her post and gave her duties to someone else. Her offer to accept redeployment having been brushed aside, she alleges financial and moral injury.

She seeks payment of the full termination indemnity she would have got if she had not been on special leave with pay; three years' pay in damages for UNIDO's unlawful treatment of her "over eleven years"; inclusion of the Tribunal's decision in her "updated and completed" personnel file; and an award of costs.

C. In its reply UNIDO contends that her complaint is irreceivable because she failed to exhaust the available internal remedies in time. The memorandum of 2 November 1993 was the administrative decision challengeable within the time limit of 60 days under 112.02(a). The Organization denies that she sought review of that decision in her memorandum of 13 January 1994 and that there were exceptional circumstances warranting waiver of the time limit. It never tried to mislead her: it drew her attention in its letter of 22 April 1994 to the rules on appeals.

On the merits it observes that leave with full pay was the course "least harmful" to her that the Director-General might choose since it safeguarded her entitlements until retirement. Though its attempts to redeploy her failed, she suffered no financial loss. Her allegations of discriminatory treatment are unfounded: UNIDO treated her more generously than others. If she had had improper treatment for years, why had she spurned the grievance procedure?

D. In her rejoinder the complainant presses her case. Although the rules neither spell out what form a request for review must take nor how the Administration should treat such request, negotiations were going on with the Director-General and showed that her objections to the decision were being entertained and she had to await a final decision. She challenges the

Organization's pleas on the merits and insists that the imposition of special leave was a misuse of authority.

E. In its surrejoinder UNIDO denies that "endless communications" from the complainant meant that "negotiations" were going on: it never gave her to understand that it might reverse the decision of 2 November 1993. Nor had it any grounds for doing so.

CONSIDERATIONS

1. After working for the United Nations in New York for two years the complainant moved to UNIDO in Vienna on 1 January 1968 at grade G.5. She reached grade P.4 on 1 April 1982 and the compulsory age of retirement on 31 August 1994.

2. On 4 October 1993 the Director of the Personnel Services Division informed her that she was one of several staff members whose appointments were likely to be terminated, the financial difficulties the Organization was undergoing at that time making it necessary to reduce staff. She replied on 6 October 1993 that she was willing to be redeployed.

3. On 2 November the Director wrote to say that the Director-General had decided not to terminate her appointment but to grant her special leave with full pay from 1 January to the end of August 1994. The Director set out a schedule of payments due. His memorandum crossed one from the complainant of the same date in which she raised a number of matters under the heading "Financial Damages Claim against UNIDO".

4. She received a reply dated 15 November 1993 from the Director-General referring to the letter of 2 November from the Director of Personnel Services and assuring her that the grant of special leave with full pay until she retired was "based on the need to vacate a certain number of posts prior to the end of the biennium". It was an alternative to termination and took into account her long service and closeness to retirement.

5. On 14 December 1993 she wrote to the Director-General to say that the payments offered in the letter of 2 November were "not enough" and she could not accept. She asked for compensation for loss of hearing in her left ear and said she awaited "an early and just decision". By a memorandum dated 13 January 1994 to the Director-General she claimed, pending a satisfactory response by 28 January 1994 from the Director of Personnel Services to the points raised in her letter of 14 December 1993,

and "within the deadline established", the right to request review of his administrative decision "according to Staff Rule 212.02" (properly 112.02). That memorandum was not answered.

6. On 11 February 1994 the Director dealt with the queries she had raised orally and in her letters of 2 November and 14 December 1993, including the reasons for putting her on special leave with full pay. By a letter dated 1 March 1994 she contested his explanations and pointed out that she still did not have a reply to her memorandum of 13 January 1994.

7. Another letter dated 22 April 1994 from the Director referring to her letter of 1 March set out further detailed explanations.

8. On 27 April she saw the Director-General, having first drafted a note containing the points she was going to discuss with him. She wrote on 14 May 1994 to thank him and to remind him that he had said he would be writing to her within a few days.

9. She says that she then saw the Director-General's personal assistant on several occasions to discuss a settlement.

10. On 2 January 1995 she wrote in reply to enquiries from the secretary of the Pension Committee about her pension status.

11. The secretary replied on 13 January to say that administrative action would be based on the information provided by the Director of Personnel Services in his letters of 11 February and 22 April 1994.

12. On 18 January 1995 the complainant wrote to the Director-General referring to her meeting with him on 27 April 1994 and to talks she had had with his personal assistant on 15 December 1994 pending his final decision about outstanding financial entitlements. She hoped for a "positive reply" from him.

13. The Director-General replied on 28 February 1995 that he had reviewed her points about the circumstances of her retirement. He referred to his letter of 15 November 1993. He said that, having reviewed her case once more, he was still satisfied that her special leave with full pay had not caused her any financial loss and that all her entitlements under the Staff Regulations and Rules had been granted. He urged her to provide instructions about payment of her pension.

14. On 27 April 1995 she filed a statement of appeal against the Director-General's decision in his letter of 28 February 1995.

15. In a report dated 25 March 1996 the Joint Appeals Board held that her appeal was not receivable. It took the view that what she was contesting was her being put on special leave with full pay and that it was the memorandum dated 2 November 1993 from the Director of Personnel Services which was the administrative decision within the meaning of Staff Rule 112.01. The period of 60 days mentioned in Rule 112.02(a) had, in the Board's view, expired on 2 January 1994. The Board saw the complainant's memorandum of 13 January 1994 as a request by her for review of the "contested and other decisions". It concluded that she should have submitted her appeal, in accordance with Staff Rule 112.02(b)(ii), no later than ninety days after 14 December 1993. Though she had "continued to contest the decision in subsequent letters and memoranda", the correspondence had "essentially covered financial implications resulting from past incidents or administrative decisions neither directly related nor made objects of a separate Appeal". A staff member could not dodge a deadline by describing objections as "preliminary" or as "subject" to a satisfactory reply to a claim.

16. The Board also considered whether there were exceptional circumstances justifying waiver of the time limit in accordance with Appendix K to the Staff Rules. On that score its conclusions were as follows:

> "46. For this purpose, the Board not only reviewed the case file in view of any impediments which, in fairness to the Appellant, could have justified such waiver, but also whether severe financial or other implications and the legal merits of the claim may have warranted such exceptional measure.
>
> 47. Considering that the Board was not competent to address various claims for compensation or redress which the Appellant raised in the course of contesting the decision under appeal;
>
> 48. - considering further that, financially, the contested decision did not affect the earnings and pension status of the Appellant until the date of mandatory retirement;
>
> 49. - considering finally, that in the view of the Board, the administration's decision of not pursuing the Appellant's request for an agreed termination with corresponding indemnities, was not obviously illegal;
>
> 50. The Board unanimously agreed that it could not waive the normal time requirements provided for appeals and concluded that it should not entertain deliberations on the main legal issues, namely whether for placing the Appellant on special leave with full pay, the administration would have needed her consent."

The Board concluded that the complainant's appeal was not receivable under Appendix K(k) of the Staff Rules and it recommended rejecting it.

17. By a memorandum dated 19 April 1996 the Director-General endorsed the recommendation and the complainant was so informed by a letter dated 23 April. That is the decision impugned.

18. Rule 112.02(a) provides:

> "A serving or former member who wishes to appeal an administrative decision ... shall, as a first step, address a letter to the Director-General, requesting that the administrative decision be reviewed. Such a letter must be sent within 60 days from the date the staff member received notification of the decision in writing."

19. UNIDO contends that the memorandum of 2 November 1993 from the Director of Personnel Services to the complainant constituted an "administrative decision" within the meaning of 112.01(a) and that she did not seek review within the time limit of 60 days in 112.02(a) but went on addressing abundant correspondence to the Organization until 1995. It submits that it never gave her to understand that the decision to grant her special leave with full pay might be changed; the purport of all subsequent correspondence and meetings with her was that the decision was "adopted, maintained and executed". The reason why the correspondence between her and the Organization went on until 1995 was that she refused its explanations, clarifications and replies and pressed her claims in repetitive and voluminous letters. The 60 days elapsed on 1 January 1994. Her letter of 14 December 1993 to the Director-General contained no request for review of the decision of 2 November 1993 to put her on special leave with full pay.

20. The complainant argues that she had 60 days from 15 November 1993 in which to request review under Rule 112.02(a) and that she did so on 13 January 1994. She then had, she says, another 60 days, i.e. until 13 March, in which to await a decision. Having received no reply, she was entitled to submit an appeal within 30 days or go to the Tribunal within 90. Meanwhile, however, the Director of Personnel Services replied directly to some of her claims and the Director-General to her request for review by inviting her to see him and discuss her claims. She saw him on 27 April 1994. She contends that her request for review of the decision to put her on special leave was in time, but she awaited the Director-General's final decision of 28 February 1995 before filing her appeal. She therefore met all

the time limits under Rule 112.02 for requesting review and for filing an appeal.

21. She argues that the memorandum of 2 November 1993 did not give her notice of special leave but rather confirmed that informal discussions had taken place with her about a proposal to place her on such leave without offering her the alternatives of reassignment or termination with indemnities. She says it was the letter of 15 November 1993 which contained the Director-General's decision on how he was going to proceed. In her rejoinder she submits that "a review of the decision [to place her on special leave with full pay] was undertaken which only became final with the Director-General's decision of 28 February 1995".

22. An appeal against an administrative decision which is challengeable under Rule 112.01(a) is one "in which the staff member alleges the non-observance of his or her terms of appointment, including all pertinent regulations and rules ...". What the complainant contested was a decision to put her on special leave. The Tribunal is satisfied that it was first notified to her in the memorandum of 2 November 1993 from the Director of Personnel Services, which said:

> "I wish to assure you that the content of your memorandum was indeed taken into consideration before the Director-General decided not to terminate your permanent appointment, but to grant you special leave with full pay in accordance with Staff Rule 107.02(a), effective 1 January 1994 until 30 August 1994, the month during which you reach mandatory retirement age. In practical terms this would mean that you cease your activities as a staff member of the Organization effective 31 December 1993 ..."

There is nothing tentative about that decision, which was taken by the Director-General. The decisions in the letters of 15 November 1993 and 28 February 1995 were repetitions of the one in the memorandum of 2 November 1993 and set off no new time limit.

23. The time limit began once the complainant received the memorandum of 2 November 1993 and expired 60 days after she received it. Since she failed to request review by the Director-General within the time limit of 60 days, she did not meet the first requirement of the internal appeal process under Rule 112.02(a). Her letter of 13 January 1994, which she headed "Appeals - Rule 212.02 - relating to proposed separation", was too late. So the time limit for her filing an appeal with the Joint Appeals Board does not come into play.

24. Appendix K to the Staff Rules says in paragraph (k):

> "An appeal shall not be receivable unless the time-limits specified in paragraph (a) or (b) of staff rule 112.2 ... have been met or have been waived, in exceptional circumstances, by the panel constituted for the appeal."

25. In answer to the ruling by the Joint Appeals Board that there were no exceptional circumstances warranting waiver of the time limit the complainant contends that her plea of continuing discriminatory treatment was within its competence and that it was disingenuous in concluding that putting her on the special leave with pay had no adverse financial consequences: she was thereby denied termination indemnities and agreed termination. Currency fluctuations affected her pension. She was subjected to "unnecessary frustration and embarrassment". The Board ignored the issue as to "whether the termination indemnities in the Staff Rules could be legally circumvented after a decision had been made to dispense with the complainant's services by forcing her on special leave". She says that the Board ignored too her explanation of delay in submissions. She was never advised that her appeal had to be filed by a particular date to preserve her cause of action. Since UNIDO had once before altered its decision on termination it was not unreasonable for her to conclude that the Director-General might again alter his approach.

26. The Organization replies that the Board found no exceptional circumstances. The matters raised by the complainant - says the defendant - relate not to exceptional circumstances but rather to substantive issues such as her termination indemnities, pension entitlements, special leave, agreed termination and compensation claims. In its submission she has not proved any exceptional circumstances. There is no evidence of any circumstances beyond her control which prevented her from making a request for a review or filing an appeal in time.

27. Discretion to determine whether there are exceptional circumstances is vested in the Joint Appeals Board. It is the Board's decision which is relevant, and the question does not arise of substituting the Tribunal's opinion for the Board's. Only if there is some fatal flaw in the Board's decision may the Tribunal intervene. No such flaw exists. The Board explained its reasons adequately. It reviewed the whole case and reached its conclusion accordingly. There was no factor which prevented the complainant from making in time her initial request for review.

28. The explanation may be, as she has said herself, that she was negotiating without help from counsel and that no-one warned her of the

time limit. But staff members are expected to know their rights: ignorance of the law is no excuse. No more legitimate is her plea that, since UNIDO had altered its decision before, it was not unreasonable for her to conclude that the Director-General would do so again. Any staff member who receives a final decision must be alert enough to ask for review within the time limit so as to preserve the cause of action and to follow up the request, if necessary, with a timely internal appeal. That should not prevent negotiation. Indeed a staff member can negotiate from a position of greater strength in the knowledge that there is no time bar.

29. The complainant failed to initiate the internal appeal procedure with a timely request for review, and the Joint Appeals Board was not at fault in concluding that no exceptional circumstances warranted waiver of the time limit. It follows that the complaint is irreceivable.

DECISION

For the above reasons

The complaint is dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

Mella Carroll

MELLA CARROLL

MARK FERNANDO

JAMES K. HUGESSEN

AB Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FOURTH SESSION

In re Wassef No. 25

Judgment 1701

THE ADMINISTRATIVE TRIBUNAL,

Considering the twenty-fifth complaint filed by Mr. Maher Nabih Wassef-Gerges against the Food and Agriculture Organization of the United Nations (FAO) on 20 January 1996 and corrected on 2 February, the FAO's reply of 15 May, the complainant's rejoinder of 26 June and the Organization's surrejoinder of 5 September 1996;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Information on the complainant's career in the FAO and the illness he contracted on duty in Chad is set out under A in Judgments 1401 and 1486 on his first, second and eighth complaints. Further relevant information may be found in Judgments 1531 and 1532 on his ninth and tenth complaints.

By a letter of 19 June 1995 the secretary of the Advisory Committee on Compensation Claims informed him of the Director-General's decision to endorse the Committee's recommendation to reimburse the expenses he had incurred for a stay in hospital in Paris and for treatment of hepatitis B and to grant him sick leave on full pay for the duration of his illness.

In a letter of 27 July 1995 he appealed to the Director-General against "wilful misconduct by the Medical Service" and claimed a total of 2 million United States dollars in damages. In a reply of 21 September 1995 the Assistant Director-General in charge of the Administration and Finance Department informed him that the Director-General had taken a "final" decision, challengeable before the Tribunal, to reject his appeal on the grounds that it did not contain anything that the Appeals Committee had not already considered in the ambit of earlier cases of his or any grievance that had not been satisfied by the recognition of his illness as service-incurred.

By a letter of 9 October 1995 he lodged an appeal with the Appeals Committee against the decision of 21 September. In a letter of 23 October, which he is impugning, the secretary of the Committee told him that appeal against that decision lay only to the Tribunal.

B. The complainant submits that the FAO treated him unlawfully. He dwells on issues he raised in earlier complaints such as the Organization's failure to declare his illness service-incurred, his stay in the hospital in Paris and the costs incurred by his wife to join him there. He alleges in the main that he was a victim of "wilful misconduct" by the FAO's medical service. He pleads breach of rule H.3 of the Administrative Rules of the United Nations Joint Staff Pension Fund, under which the FAO should have asked the staff pension committee to determine whether he should get a disability benefit.

He seeks awards of $1 million in damages for "this wilful misconduct" and a further million for the resulting loss of earnings. He claims $6,000 in costs and the imposition of a penalty in the amount of one-half of the aggregate award for every two weeks' delay in executing the judgment after a period of 30 days from the date of delivery. He wants the Tribunal to order publication of the judgment at the Organization's expense in twelve newspapers and magazines, four of them American, four European and four Arabic.

C. In its reply the FAO contends that the complaint is devoid of merit and the claims to damages "unreasonable". It observes that the complainant has not adduced a shred of evidence to back up his allegations of "misconduct". As for its obligations under rule H.3, it points out that none of the medical reports available to it, including one by his own doctor, suggested that he might be incapacitated within the meaning of the rule. Lastly, it points out that neither "strong" nor "abusive" language can make his allegations believable: they must be supported by evidence.

D. In his rejoinder the complainant takes the Organization to task for its "distortions" of fact and "staff betrayal". In view of its "dilatory tactics" he presses his claim to the imposition of a penalty clause and charges it with failing to execute "lawfully and properly" Judgment 1486 on his eighth complaint.

E. In its surrejoinder the Organization rejects his "sweeping" attacks. Not only is his allegation of failure to execute Judgment 1486 unfounded, but he has already made it in three earlier complaints.

CONSIDERATIONS

1. This is the twenty-fifth complaint that the complainant has filed against the FAO. By Judgment 1452 of 6 July 1995 the Tribunal dismissed his third complaint, in which he had claimed 2 million United States dollars in damages. In Judgments 1453, 1454 and 1455 of even date it dismissed his fourth, fifth and sixth complaints, in which he had claimed awards of $8,000,001, $2,500,000 and $3 million. Judgment 1485 of 1 February 1996 dismissed his seventh complaint, in which he had sought $5 million in damages for "inflicted atrocities". There followed five other complaints - his ninth, tenth, thirteenth, fourteenth and twenty-fourth - seeking damages in the amounts of $1 million, $3 million, $8,000,001, $2 million and $10 million, all of which the Tribunal dismissed on 11 July 1996, in Judgments 1531 to 1535. On 30 January 1997 the Tribunal dismissed in Judgments 1571 to 1574 six more complaints - the sixteenth, seventeenth, eighteenth, nineteenth, twentieth and twenty-first - in which Mr. Wassef claimed a total of $12.5 million.

2. The unseemly terms in which he often casts his briefs do not befit any litigant. Judgment 1531 spoke of the "intemperate language" of his pleadings and drew attention to the "duty of respect" he owed to "the defendant and to its staff". Judgment 1532 made the same two points. As to his pleadings the Tribunal further commented in Judgment 1533 that:

> "Both the want of evidence to support the complainant's allegations and the absurdity of his claims show his complaint to be trifling and an abuse of process."

3. The Tribunal need not compare this complaint with his earlier ones to identify the pleas that are *res judicata*. The nub of his case is that the staff of the FAO's medical service and of other units were guilty of "wilful misconduct" and he is seeking awards of $1 million in damages on that count and another million in damages for the loss of earnings he attributes to such misconduct.

4. Those two claims are devoid of merit. Someone may get damages for specific injury attributable to an unlawful act committed by an official, but not a further sum in damages for the mere commission of the act. As earlier judgments on the complainant's cases observed, a distinction must be drawn between:

(i) the act itself;

(ii) the injury and any other consequence attributable thereto; and

(iii) the causal link between act and consequence.

A basic precept of law requires a claimant to prove each of the three components. Here the complainant has failed to adduce evidence of any value in law to bear out his allegations, his own notes and letters not amounting to such. For that reason alone his main claims must fail.

5. Since they do, so must his subsidiary claims to $6,000 in costs, to payment of the costs of publishing this judgment in four American, four European and four Arabic daily newspapers and magazines and to imposition of a penalty for failure to execute the judgment within 30 days of delivery.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

MICHEL GENTOT JULIO BARBERIS JAMES K. HUGESSEN

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FOURTH SESSION

***In re* Wassef (No. 26)**
(Application for execution)

Judgment 1702

THE ADMINISTRATIVE TRIBUNAL,

Considering the application filed by Mr. Maher Nabih Wassef-Gerges on 3 July 1996 for the execution of Judgment 1486, the reply of 22 November from the Food and Agriculture Organization of the United Nations (FAO), the complainant's rejoinder of 21 December 1996 and the FAO's surrejoinder of 18 April 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS

1. On 1 February 1996 the Tribunal delivered Judgment 1486 on Mr. Wassef's eighth complaint. It held that the illness which he had contracted in Chad in August 1993 must be presumed to be attributable to the performance of his duties. It therefore sent the case back to the Organization to determine his rights in accordance with the Staff Regulations and Staff Rules.

2. When the Tribunal delivered that judgment it did not know that on 19 June 1995 the FAO had recognised his illness as service-incurred. He filed an internal appeal against that decision on 28 June 1995, and the Organization answered in a memorandum of 25 July. Two days later he sent a minute to the Organization asking for clarification about the Director-General's recognition of the illness as "service-incurred". The same day the defendant answered in plain enough terms: "your illness is recognized as service-incurred by the Organization". There is no evidence before the Tribunal to suggest that the complainant pressed the appeal he had lodged

on 28 June. The decision of 19 June 1995 therefore satisfied his claim and settled once and for all the issue relating to his illness. The defendant says that it paid him all the sums due to him in accordance with that decision, and the complainant does not challenge the proof it has provided for that statement.

3. Neither of the parties informed the Tribunal of the FAO's decision of 19 June 1995 to recognise the complainant's illness as service-incurred. The Tribunal regards that failure as a breach of the courtesy which the parties owed it.

4. The complainant states in his present complaint that the Organization has failed to execute point 1 of the ruling in Judgment 1486. He has filed what he calls an "Application for comprehensive execution for item 1 of Judgment 1486 ... including interpretation". That title is a misnomer. In fact, besides the application for execution, which the complainant founds on the alleged failure by the Organization to execute the Tribunal's ruling, he puts forward other claims which go beyond the ambit of the judgment.

5. As regards execution the FAO's decision of 19 June 1995 allowed his claim to recognition that the illness that he had contracted in Chad was service-incurred. Accordingly, the claims that he founds on failure to execute Judgment 1486 are irreceivable. As for those that go beyond the scope of the application for the execution of the judgment, he must first exhaust his internal remedies insofar as the Tribunal has not already ruled on those claims and they are not on that account irreceivable.

DECISION

For the above reasons,

The application is dismissed.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

MICHEL GENTOT JULIO BARBERIS JAMES K. HUGESSEN

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-FOURTH SESSION

***In re* Broere-Moore (No. 2)** **Judgment 1703**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs. Sylvia Broere-Moore against the United Nations Industrial Development Organization (UNIDO) on 16 August 1996 and corrected on 15 October, UNIDO's reply of 20 January 1997, the complainant's rejoinder of 30 April and the Organization's surrejoinder of 11 August 1997;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant's career at UNIDO is summed up under A in Judgment 1483, which was about her first complaint. Appended to the Organization's final brief in that complaint was a letter of 17 November 1994 from her former supervisor to the acting chief of the Personnel Administration and Social Security Section.

The letter referred to "two contradictory versions" of a report appraising her performance, to her failure "despite repeated reminders" to return the report for his signature and to his dissatisfaction with "promotional" aspects of her work.

By a letter of 17 August 1995 she asked the Director-General to review, among other matters, "the Administrative decision" to misuse the contents of the letter of 17 November 1994 in order to "obfuscate" the termination of her appointment. In a reply dated 8 September 1995 the Director of the Personnel Services Division told her on the Director-General's behalf that since she had already put to the Tribunal "most of the issues" she was raising it would be "inappropriate" to comment any further. In a letter of 31 October 1995 she lodged her appeal with the Joint Appeals Board.

In its report of 4 April 1996 the Board recommended rejection on grounds of receivability: it was competent neither to advise the Director-General in the absence of an appealable administrative decision nor to review a performance appraisal report. By a letter of 2 May 1996 the Director-General told the secretary of the Board that he had decided to endorse its recommendation. That decision, of which she got notice on 20 May, is the one under challenge.

B. The complainant submits that by withholding her former supervisor's statement on her performance UNIDO led her to agree to separation under false pretences. Since the Administration had her sign the termination agreement in ignorance of an "essential" fact of her employment it voided the agreement. She pleads breach of good faith and of the Organization's duty to tell her "what the termination was really about". The Appeals Board was mistaken in treating the letter of 17 November 1994 as an appraisal report: she had no reason to challenge a report that said she had fully achieved the expected results.

She invites the Tribunal to set aside the decision to make use of the letter of 17 November 1994; to order UNIDO to keep on file the performance appraisal report which gave her "full ratings in Section 2 and 4.1" and remove from her file and destroy any "adverse" documents that contradict the report, including the letter of 17 November 1994; to compensate her for loss of salary from 1 January 1994 and for moral injury; to restore the *status quo ante*; and to award her costs.

C. UNIDO replies that her complaint is irreceivable. Production of a document in a brief to the Tribunal is not an appealable administrative decision within the meaning of the Staff Rules. What is more, none of her claims save her first was included in her request for review and internal appeal.

In subsidiary argument on the merits UNIDO observes that her pleadings are mainly a "rehash" of her first complaint. So any matter they raise is *res judicata*. In any event she left under the terms of an agreed termination, not for unsatisfactory performance. She has only herself to blame for any confusion about the authenticity of her appraisal report since she acknowledged amending it before she signed it.

D. In her rejoinder the complainant enlarges on her earlier pleas and dwells on alleged defects in the Tribunal's ruling on her first complaint. She takes issue with UNIDO's comments on her appraisal report, on which it based the decision to terminate her appointment. She presses her claims.

E. In its surrejoinder the Organization observes that her supervisor's appraisal has nothing to do with the termination of her appointment, which came about by mutual agreement. The "new" reasons she cites for termination are neither here nor there.

CONSIDERATIONS

1. The complainant joined UNIDO on 19 May 1992 as the chief of its Public Relations and Information Section under a fixed-term appointment for two years. The Organization prematurely terminated her appointment in the course of a staff-reduction exercise and by virtue of an "agreed termination" dated 30 November 1993 under Staff Regulation 10.3(c). The complainant challenged that termination in her first complaint on the grounds, among others, of breach of due process, abuse or misuse of procedure, deception, duress and the suppression of material information.

2. In the pleadings on her first complaint ("the previous proceedings") UNIDO referred to the report, signed by her supervisor and herself, appraising her performance from 19 May 1992 to 18 May 1993. The Organization contended that the requisite procedures had not been followed and in particular that the Director-General had not countersigned it. In her rejoinder, the complainant made extensive submissions challenging the accuracy and regularity of that report.

3. In the surrejoinder it filed on 12 June 1995 UNIDO submitted that "the available copies of the performance appraisal report cannot be considered to form part of the complainant's official record with UNIDO, due to the irregularities pointed out" in a letter written by her supervisor on 17 November 1994 to the acting chief of the Personnel Administration and Social Security Section. One irregularity alleged was that there were "two contradictory versions" of that report. The first was a photocopy of the original appraisal report, which had been made after the supervisor had given her a "fully achieved" rating for each work assignment and had signed it; the second version was the original report, which contained, besides

those ratings, detailed comments which the supervisor said he had not made but which the complainant had herself added after her supervisor had signed that section of the report and returned it to her. In his letter of 17 November 1994 her supervisor also made the following comments which he had not recorded in the report itself:

> "I discussed with her on several occasions the sensitive nature of her function and the importance the Organization attached to the promotion of better image and strong public relations. I also informed her that I was not fully satisfied as far as her effort in the direction of the promotional aspects of her work is concerned."

4. In Judgment 1483 the Tribunal held that her first complaint was irreceivable and that her claims must fail. It said:

> "14. Insofar as her complaint seeks to impugn any action which the Organization took before 30 November 1993 it is irreceivable under Article VII(1) of the Tribunal's Statute because she is not impugning a final decision.
>
> ...
>
> 16. Since she agreed not to contest the decision of 30 November 1993 the termination was an agreed one. Even supposing she had grounds for appeal against that termination her letter of 27 January 1994 was not an appeal which satisfied the requirements of Rule 112.02(a). So again any appeal to the Tribunal against the 'agreed termination' is irreceivable for failure to exhaust the internal remedies."

The Tribunal did not take into account, one way or the other, either her supervisor's letter of 17 November 1994 or any aspect of her performance, or her performance appraisal report, or the appraisal procedures.

5. The complainant says that she became aware of the letter of 17 November 1994 only on receiving the surrejoinder on her first complaint. Within 60 days, by a letter of 17 August 1995, she asked the Director-General:

> "to review the Administrative decision to misuse the contents of the letter in order to obfuscate the wrongful and unlawful termination of my contract with UNIDO, i.e. by using the unfounded allegations regarding my performance, the alleged irregularity of my performance appraisal report, and to review the administration's procedural flaws and lack of due process in doing so."

The Director-General replied on 8 September 1995 that her first complaint referred to most of the issues contained in her letter and that it would be "inappropriate" to make additional comments at that stage.

6. On appeal the Joint Appeals Board held that neither the letter of 17 November 1994 nor UNIDO's decision to produce that letter in the previous proceedings before the Tribunal constituted an administrative decision notified to the complainant in writing, within the meaning of Staff Rule 112.02(a) and insofar as her appeal related to her performance appraisal report she should have had recourse to the procedure lain down in Appendix M of the Staff Rules. The Board concluded that it was neither competent to review that report nor to advise on the legality of the use made of it in the proceedings before the Tribunal. The Board recommended rejecting the appeal and the Director-General did so.

7. In this, her second, complaint to the Tribunal the complainant has claimed the redress set out in B above.

The letter of 17 November 1994

8. The complainant's contentions about the letter of 17 November 1994 may be summed up as follows. UNIDO used it in its surrejoinder on her first complaint "to justify the unlawful termination of [her] contract by invoking unfounded allegations regarding [her] performance, and by alleging irregular procedure in processing the performance appraisal report". In her view termination for that new reason, namely unsatisfactory performance, had to be based on a detailed contemporaneous memorandum, not on one written long afterwards. Further, UNIDO ought to have sent her a copy of that letter promptly so that she could have answered it on receipt and in her rejoinder, and its failure to do so was a procedural flaw and an obstruction of due process. Instead it used the letter "as an essential part of the Administration's motivation and action to justify engineering the termination of [her] contract". The way in which it used that letter indicates that it intended to withhold information necessary to enable her to make up her mind about the approach to take to the Director-General's decision to terminate her contract. It "thus abused power throughout by deliberately hiding this letter which would expose as illegal the Director-General's decision to terminate [her] contract under the ostensible penumbra of a staff

reduction exercise". The agreed termination is therefore void. She also expresses doubts about the authenticity of the letter.

9. The letter did not contain any decision and was not communicated to the complainant. It was written long after the "agreed termination" and it could have had no influence whatever either on UNIDO or the complainant in regard to that termination. Even if the Organization had thought the letter of some value as evidence in the previous proceedings it was under no duty to send a copy to her in advance so as to let her reply. Neither the writing of the letter, nor the delay in bringing it to the complainant's notice, nor the use made of it by UNIDO in those proceedings was an administrative decision subject to review under Staff Rule 112.2(a). The complainant's claims in those respects are therefore irreceivable.

10. In her rejoinder on her first complaint she said that she had been told before the "agreed termination" that performance was not a criterion for the selection of staff for retrenchment because the performance appraisal reports showed that all the staff were performing well. In ruling on that complaint the Tribunal did not consider any aspect of the complainant's performance, of her performance appraisal report or of the appraisal procedures. And even supposing that UNIDO's intention was to rely on the adverse comments in the letter of 17 November 1994 to show unsatisfactory performance, those comments were of no probative value: they were not only belated but also contradicted by the unqualified "fully achieved" ratings admittedly given in the formal appraisal process. It was that process that mattered. Thus the letter was not relevant to the outcome of the previous proceedings and had no effect on it. So the complainant's claims as to the letter fail on the merits as well.

Other claims

11. The complainant contends that Judgment 1483 ruled only that her first complaint was irreceivable and did not dismiss it on the merits; that the "agreed termination" was vitiated by material error, non-disclosure of essential facts, deception, blackmail and duress, which the Tribunal should now consider; and that the letter of 17 November 1994 is new evidence that warrants review of Judgment 1483. She asks that the performance appraisal report signed by her supervisor and giving her "fully achieved" ratings be kept in her file and that all documents that are inconsistent with it be expunged; in effect, she wants UNIDO to treat that report as having been duly made final.

12. The request which the complainant made on 17 August 1995 for review was confined to "the Administrative decision to misuse the contents of the letter" of 17 November 1994 and the "procedural flaws and lack of due process in doing so". Her other claims, relating to the "agreed termination" and the performance appraisal report, fall outside the scope of that request and are irreceivable on account of her failure to exhaust her internal remedies. Further, her claims in respect of the "agreed termination" were dismissed by Judgment 1483, and the letter of 17 November 1994 had no relevance to that termination and affords no ground for review of that judgment.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

Mella Carroll

MELLA CARROLL

MARK FERNANDO

JAMES K. HUGESSEN

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
* GENEVA *

EIGHTY-FOURTH SESSION

***In re* Broere-Moore (No. 3)** **Judgment 1704**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mrs. Sylvia Broere-Moore against the United Nations Industrial Development Organization (UNIDO) on 16 August 1996 and corrected on 15 October, UNIDO's reply of 20 January 1997, the complainant's rejoinder of 30 April and the Organization's surrejoinder of 11 August 1997;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant's career at UNIDO is summed up under A in Judgment 1483, which dismissed her first complaint. Among the texts the Organization appended to its final brief on that complaint was a "list of comparative amounts" showing how much she received upon agreed termination and how much she would have had if she had stayed on until 18 May 1994, when her appointment would have expired. It suggested that the agreed termination brought her some 29,000 United States dollars more, including its own contributions to the United Nations Joint Staff Pension Fund, than staying on would have done.

By a letter of 17 August 1995 she asked the Director-General to review, among other matters, "the Administrative decision" to use the list "as an illegal base for terminating my contract and for miscalculating the payments put forward". In a reply dated 8 September 1995 the Director of the Personnel Services Division told her on the Director-General's behalf that since she had already put to the Tribunal "most of the issues" she was raising it would be "inappropriate" to comment further. In a letter of 31 October 1995 she lodged her appeal with the Joint Appeals Board.

In its report of 4 April 1996 the Board recommended rejection on grounds of irreceivability: it was, it said, not competent to advise the Director-General in the absence of an appealable administrative decision. By a letter of 2 May 1996 the Director-General told the secretary of the Board that he had decided to endorse its recommendation. She got notice of that decision on 20 May, and it is the one she is challenging.

B. The complainant submits that the amounts in the table are incorrect and betray UNIDO's intent to terminate her appointment "fraudulently". The figures included an option not open to her - namely, serving out her appointment - and this, she says, was how the Organization used "blackmail" to make her sign a termination agreement she had wanted no part of. Having threatened to end her appointment with one month's notice if she did not agree to his terms, the Director-General misused his authority. Since the Administration withheld a detailed statement of the amounts due, the termination was unlawful.

She invites the Tribunal to set aside the decision to use the list to back up "its blackmail threat to terminate [her] contract"; grant her the difference between what UNIDO paid her in January 1994 and what she would have got under the terms of her appointment; and award her compensation for UNIDO's "improper blackmail threat" and "redress the situation so that I am in an equivalent situation I would be in, had the blackmail not taken place". She also claims costs.

C. In its reply UNIDO contends that the complaint is irreceivable. The submission of evidence to the Tribunal does not constitute an appealable administrative decision within the meaning of the Staff Rules. If the complainant wished to challenge the reckoning of a payment, she had only to act within the time limit set in Staff Rule 112.02. But what she plainly seeks is the quashing of her agreed termination, and that is *res judicata*, the Tribunal having held that she had agreed not to contest it.

On the merits UNIDO points out that the figures in the comparative table are correct and that she got her due under the terms agreed to. In any event she was fully aware at the material time of the exact amounts she could have by way of compensation and entitlements. Most of her complaint is just an attempt to reopen a case that the Tribunal has already dismissed.

D. In her rejoinder she disputes UNIDO's reply and enlarges on her own pleas. Her complaint is about new evidence which UNIDO produced and which warrants review of Judgment 1483. Having agreed under duress to the Organization's terms, she was free to challenge them. She presses her claims.

E. In its surrejoinder the Organization maintains that her complaint is irreceivable and explains that the termination indemnity it paid her in January 1994 matched the amount it gave in the list.

CONSIDERATIONS

1. The complainant joined UNIDO on 19 May 1992 as the chief of its Public Relations and Information Section under a fixed-term appointment for two years. The Organization prematurely terminated her appointment in the course of a staff-reduction exercise and by virtue of an "agreed termination" dated 30 November 1993 under Staff Regulation 10.3(c). The complainant challenged that termination in her first complaint on the grounds, among others, of breach of due process, abuse or misuse of procedure, deception, duress and the suppression of material information.

2. The terms of "agreed termination" suggested by UNIDO had been the subject of discussions and letters in the six weeks preceding 30 November 1993. The correspondence also contains reference to the payments which the complainant would have received if she had served the full period of her fixed-term appointment.

3. In the surrejoinder it filed on 12 June 1995 on her first complaint UNIDO submitted that a "table prepared by the Personnel Services shows that the payments received by the complainant under [the agreed termination] were superior to those she would have received had her contract run its full course"; it produced a document showing what it called the "Amount received by complainant in accordance with agreed termination" and the "Amount which would have been received by complainant had she worked until the end of her appointment on 18 May 1994".

4. Judgment 1483 ruled that the first complaint was irreceivable and that the complainant's claims must fail. The Tribunal did not consider that document or the complainant's motives for agreeing not to contest the

termination of her appointment or the financial consequences of such termination.

5. The complainant says that only on receiving the surrejoinder did she become aware of the document, which she describes as a "list of comparative amounts". Within 60 days, by a letter of 17 August 1995, she asked the Director-General:

> "to review the Administrative decision to use this list as an illegal base for terminating my contract and for miscalculating the payments put forward."

The Director-General replied on 8 September 1995 that her first complaint referred to most of the issues contained in her letter and that it would be "inappropriate" to make additional comments at that stage.

6. On appeal the Joint Appeals Board held that the "decision to use allegedly wrong or misleading tables of actual and hypothetical payments" was not an administrative one within the meaning of Staff Rule 112.02(a). It recommended rejecting her appeal and the Director-General did so.

7. In this, her third, complaint she is seeking the redress set out in B above.

8. She contends that she was not paid the amount due to her as shown in the list, that the amount she would have received had she worked until 18 May 1994 was understated, and that she was thereby misled into not contesting the termination.

9. The amount due to the complainant in terms of the "agreed termination" consisted of (a) her pay for December 1993; (b) an aggregate sum of 49,543 United States dollars made up of compensation for accrued annual leave, termination indemnity, three months' pay in lieu of notice, health insurance and repatriation and education grants; and (c) UNIDO's contributions for her to the United Nations Joint Staff Pension Fund for the period from 1 January 1994 to 31 March 1995, amounting to 19,405.50 dollars.

10. As to the first two items UNIDO has produced the complainant's pay slip for December 1993 and the relevant vouchers, which show that the sums were paid in full, less only an outstanding sum of 5,041.58 dollars, the balance due on a loan she had obtained from the Staff Assistance Fund.

11. As for the third item, the "agreed termination" provided for putting her on special leave without pay until 31 March 1995. But in September 1994, and at her own request, UNIDO brought the date of expiry

of her special leave without pay forward to 31 July 1994 so as to let her withdraw her own Pension Fund contributions; and so it stopped making contributions after that date. She raises no objections on that score.

12. However, the list shows a reduced amount of 9,055.90 dollars as UNIDO's share of Pension Fund contributions. That reflects the adjustment made in September 1994 and confirms that the list was prepared only thereafter. Since that was long after the "agreed termination", the list obviously cannot have influenced the termination in any way.

13. UNIDO's decision to cite that list – whether the figures were correct or not – in the proceedings on the first complaint was not an administrative decision notified to the complainant within the meaning of Staff Rule 112.02(a). The complaint is therefore irreceivable.

14. It also fails on the merits. The payments due to the complainant were made, and there was no miscalculation. Even assuming that there might have been some inaccuracy in the list, the complainant cannot have been misled by it since it came into existence only after the "agreed termination".

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

Mella Carroll

MELLA CARROLL

MARK FERNANDO

JAMES K. HUGESSEN

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

EIGHTY-FOURTH SESSION

***In re* Broere-Moore (No. 4)** **Judgment 1705**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mrs. Sylvia Broere-Moore against the United Nations Industrial Development Organization (UNIDO) on 16 August 1996 and corrected on 15 October, UNIDO's reply of 20 January 1997, the complainant's rejoinder of 30 April and the Organization's surrejoinder of 11 August 1997;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant is a former official of UNIDO. Details of her career in the Organization appear under A in Judgment 1483, which dismissed her first complaint.

By a letter of 30 March 1992 the chief of the Recruitment Section offered her on the Director-General's behalf a two-year appointment at step 5 of grade P.5 on transfer from the World Meteorological Organization (WMO). After she had talked the matter over with the Director of the Personnel Services Division, the chief of Recruitment wrote her a letter on 18 May cancelling the original offer and making her a new one of a two-year appointment at step 3 of grade P.5. On 20 May she wrote "offer accepted" at the bottom of the letter and signed it. She signed a corresponding letter of appointment the same day.

On 12 June 1995 the Organization submitted to the Tribunal as an annex to its final brief on her first complaint a copy of a fax the officer-in-charge of the Recruitment Section had sent her on 22 April 1992. It said, among other things, that whether she decided to resign from her post at the WMO or not the decision "would not affect the step in the P.5 scale which was offered to her" in the letter of 30 March. That was step 5.

In a letter of 17 August 1995 she told the Director-General that she had first seen the fax in UNIDO's brief and asked him to review what she called the "error" of appointing her at step 3 of P.5. In a reply dated 8 September 1995 the Director of the Personnel Services Division told her on the Director-General's behalf that since she had already put to the Tribunal "most of the issues" she was raising it would be "inappropriate" to comment further. In a letter of 31 October 1995 she lodged an appeal with the Joint Appeals Board. In its report of 4 April 1996 the Board recommended rejecting her appeal as time-barred. By a letter of 2 May 1996 the Director-General told the secretary of the Board that he had decided to endorse its recommendation. She got the decision on 20 May, and it is the one she is impugning.

B. The complainant submits that the decision to appoint her at step 3, and not 5, was unlawful. Not until UNIDO produced the copy of the fax of 22 April 1992 did she have any grounds for appeal. She observes that upon reporting for duty in Vienna she "challenged" the loss of steps but a personnel officer told her the Organization was free to offer her whatever step it pleased.

She invites the Tribunal to set aside the "decision to withhold information" about her step at recruitment and to recruit her "at the wrong Step"; pay her the difference between the sums she received and what she would have had "at the correct step"; and grant her "all other payments in compensation of salary loss from 1 January 1994, reckoned on the salary and allowances of the Step [she] should have been granted". She also claims costs.

C. In its reply UNIDO contends that the complaint is irreceivable for failure to appeal within 60 days of getting notice of her step in the letter of appointment. What is more, her claim to compensation goes further than her internal claim, which was to payment of "retroactive financial adjustments", and is to that extent irreceivable on account of her failure to exhaust the internal remedies.

On the merits UNIDO observes that she does not put forward any reason why she should have got the higher step. Nor does she say why she signed the letter of appointment if the step was unacceptable.

D. In her rejoinder the complainant recounts the conditions under which she left the WMO and agreed to take up duty "urgently" at UNIDO. She insists that the personnel officer misled her at the time of recruitment and charges the Organization with breach of good faith: it had a duty to tell her she had one year in which to have her step put right. So the delay in lodging her appeal was UNIDO's fault not hers. She presses her claims.

E. In its surrejoinder the Organization comments on the issues she raises in her rejoinder and maintains that the complaint is irreceivable and in any event without merit.

CONSIDERATIONS

1. Having resigned from service with the World Meteorological Organization (WMO) in Geneva, the complainant joined UNIDO on 19 May 1992 at its headquarters in Vienna as chief of the Public Relations and Information Section. She got a fixed-term appointment for two years at grade P.5, step 3. Her complaint is that UNIDO should have given her step 5.

2. By a letter dated 30 March 1992 the chief of the Recruitment Section in the Personnel Services Division had offered her "on transfer" from WMO the fixed-term appointment at step 5 of grade P.5. She accepted by a fax message dated 1 May 1992 and UNIDO asked her to report for duty on 18 May.

3. On 15 May in Geneva there was discussion between her and the Director of the Personnel Services Division of UNIDO. On 20 May she was given a letter dated 18 May 1992 and signed by the chief of Recruitment which said:

> "Following your discussion ... on 15 May 1992 ... the offer of appointment made to you on 30 March 1992 is herewith cancelled and superseded as follows."

The letter offered her an appointment at step 3 of grade P.5 as from 19 May 1992. She added the words "offer accepted" and signed that letter, as well as the letter of appointment, on 20 May.

4. She failed to seek review of the decision to give her step 3 within the time limit of sixty days set in Staff Rule 112.02 or indeed at any time before the termination of her appointment.

5. Her appointment was prematurely terminated by an "agreed termination" dated 30 November 1993, which she challenged in her first complaint. The Tribunal dismissed that complaint in Judgment 1483.

6. In the proceedings relating to that complaint UNIDO produced with its surrejoinder of 12 June 1995 a fax letter which the officer-in-charge of the Recruitment Section had sent the complainant on 22 April 1992 and which contained a response to a specific question she had raised:

> "Whether or not you resign from WMO would not affect the step in the P.5 scale which was offered to you in [the letter of 30 March 1992], i.e. P.5 step V."

7. The complainant says that she did not receive that fax at the time and indeed became aware of it only when she got the surrejoinder, less than sixty days before 17 August 1995. That was the date at which she wrote asking the Director-General to review the administrative decision to recruit her at step 3 instead of step 5. He refused. On appeal the Joint Appeals Board recommended rejecting her appeal as irreceivable on the grounds that she had not sought review within sixty days of getting her letter of appointment. The Director-General endorsed that recommendation.

8. In her fourth complaint she is asking the Tribunal to "quash UNIDO's decision to withhold information regarding the step at which [she] should have been recruited and recruit [her] at the wrong Step in the Grade" and to award her the additional payments which would have been due if she had been recruited at step 5.

9. The fax letter of 22 April 1992 restated, quite accurately, the terms of the subsisting offer made to the complainant on 30 March 1992, namely

that she would be put at step 5 whether or not she resigned from the WMO. The fax letter had no bearing on the subsequent decision to vary that offer, and the fact that she did not receive it did not mean that any information pertaining to the subsequent offer had been withheld from her.

10. She had duly accepted the offer of 30 March 1992 and she was under no obligation to agree to any variation. If aggrieved by the subsequent decision to put her on step 3, she should have asked for review within the sixty days.

11. The complaint is therefore irreceivable.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

Mella Carroll

MELLA CARROLL

MARK FERNANDO

JAMES K. HUGESSEN

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

EIGHTY-FOURTH SESSION

***In re* Broere-Moore (No. 5)** **Judgment 1706**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mrs. Sylvia Broere-Moore against the United Nations Industrial Development Organization (UNIDO) on 16 August 1996 and corrected on 15 October, UNIDO's reply of 20 January 1997, the complainant's rejoinder of 30 April and the Organization's surrejoinder of 11 August 1997;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Judgment 1483, which dismissed Mrs. Broere-Moore's first complaint, sums up under A her career with UNIDO. Having taken part in a competition to fill her former post, she learned that on 1 September 1994 the Director-General had chosen someone else. In a letter of 23 September 1994 to the Director-General she objected, among other things, to that appointment. In a reply of 17 October 1994 the Director of the Personnel Services Division told her on the Director-General's behalf that it would be not be "appropriate" to comment on issues she had already raised in her first complaint.

In a letter of 17 August 1995 she asked the Director-General to review the "administrative decision" not to address in the Organization's surrejoinder on that complaint the "inequity and gender discrimination of appointing an outside male candidate" to her former post. Replying again on behalf of the Director-General, the Director of Personnel Services told her in a letter of 8 September 1995 that her "non-selection" did not warrant administrative review because the matter had no bearing on the terms of her appointment.

By a letter of 31 October 1995 she lodged an appeal with the Joint Appeals Board. In its report of 4 April 1996 the Board recommended rejection on the grounds that there had not been an "administrative decision" within the meaning of Staff Rule 112.01 and it was not competent to advise on the Administration's refusal to comment on a particular matter in pleadings before the Tribunal; as for what it called "the indirectly challenged decision of not selecting her" it said the matter was unrelated to her terms of appointment and "would not have been receivable". By a letter of 2 May 1996 the Director-General told the secretary of the Board that he had endorsed its recommendation. That is the impugned decision, of which she got notice on 20 May.

B. The complainant submits that the decision to pick an outside male candidate for her former post shows "inequity and gender discrimination". He was not more qualified than she and it was wrong to appoint him while she was still on the staff, the more so since the Director-General was terminating her appointment for reasons of staff reduction.

She wants the Tribunal to order UNIDO to grant "redress and pay due compensation" for appointing an outside male candidate to her former post. She also seeks an award of costs.

C. In its reply UNIDO contends that her complaint is irreceivable. At the time of the challenged appointment she was no longer on its staff, the date of expiry of her special leave having been advanced to 31 July 1994 to allow her to withdraw her contributions to the United Nations Joint Staff Pension Fund. It follows that the appointment impaired none of her rights and no appeal lay against it. Even if she had been on special leave without pay at the time it would have been no breach of the terms of her appointment to put someone else on a post she had left under an agreement.

UNIDO's pleas on the merits are subsidiary. It denies discriminating against her. The choice of another candidate to fill her former post, which it had no reason to abolish, was a proper exercise of discretion.

D. In her rejoinder the complainant seeks to refute UNIDO'S reply. She dwells on the "error of fact" in Judgment 1483 about "agreed termination": she had not entered freely into the agreement and so there was no agreement at all. Her first complaint having failed on receivability, the Tribunal's comments on the merits do not "constitute *res judicata*". She presses her claims.

E. In its surrejoinder the Organization describes her rejoinder as a further attempt to reopen the matter of agreed termination, on which the Tribunal has ruled.

CONSIDERATIONS

1. On joining UNIDO on 19 May 1992 the complainant became chief of its Public Relations and Information Section. Her grade was P.5 and she held a fixed-term appointment for two years. The Organization prematurely terminated it in the course of an exercise in staff reduction and by an "agreed termination" dated 30 November 1993 under Staff Regulation 10.3(c). She made that the subject of her first complaint, which the Tribunal dismissed in Judgment 1483. One of the terms of termination was that she was to be put on special leave without pay from 1 January 1994 to 31 March 1995.

2. The reduction of staff affected women more than men in senior posts in the Professional category. Thus none of the 74 men at grade P.5 went, but five out of the eight women did, their departure increasing what the complainant calls the "gender imbalance" at that grade.

3. When the complainant went on special leave the Director-General appointed as officer-in-charge from 1 January 1994 a man who had been an unsuccessful applicant for the post of chief of the Public Relations and Information Section, which had gone instead to the complainant.

4. On 22 February 1994 UNIDO advertised the vacant post of chief of the Public Information Section. It is not disputed that this post was identical to the one the complainant had held, the required qualifications and the functions being the same. The notice of vacancy stated that "interested female candidates" were "particularly encouraged to apply". The complainant applied before the closing date, which was 10 March 1994.

5. On 1 September 1994 UNIDO appointed a man who was an external candidate, and by her letter of 23 September 1994 the complainant asked for review. By a letter dated 17 October 1994 UNIDO replied that her first complaint referred to "most of the issues contained in the abovementioned letter" and that "it would not be appropriate to make any

additional comments". In a letter of 17 August 1995 the complainant said that the Organization's pleadings on that complaint had not dealt with the issue and she repeated her request of 23 September 1994. She received a similar reply dated 8 September 1995 from the Director of Personnel Services.

6. On appeal the Joint Appeals Board held that it lacked competence because her appeal did not relate to an administrative decision within the meaning of Staff Rule 112.01(a) and her objections to the appointment of a man were not based on non-observance of the terms of her appointment: she was alleging discrimination, and for that UNIDO had, like other United Nations agencies, established a specialised body known as the "Panel on Discrimination and Other Grievances", which alone was competent.

7. In this, her fifth complaint the complainant is asking that UNIDO be ordered to grant "redress and pay compensation for the inequity and gender discrimination in appointing an outside male candidate to [her] post".

8. She contends, first, that she was an internal candidate and so entitled to the benefit of Staff Rule 103.12(a)(ii), which provides:

> "... the appointment and promotion bodies shall, in filling vacancies, normally give preference, where qualifications are equal, to staff members already in the service of the Organization ..."

9. Her second contention is that the chief of Personnel Administration acknowledged that:

> "In principle, the Organization supports the various resolutions adopted by the [United Nations] on the status of women. The Organization has also to implement its governing bodies' policies for increasing the participation of women at all levels."

Such policy was, she observes, also reflected in the vacancy notice, which encouraged women to apply; but UNIDO failed to comply and instead resorted to "gender discrimination".

10. Finally, she alleges that the successful candidate had been an employee of the Organization of Petroleum Exporting Countries (OPEC); that "under pressure of OPEC's Secretary-General, his compatriot, UNIDO's recruitment chief, felt obliged to put the name of this OPEC candidate on the UNIDO roster when UNIDO was downsizing"; and that that was why the notice invited applicants from the roster. She contends that the successful candidate did not satisfactorily complete probation, which UNIDO extended by a year, and it reassigned him to its Office in Geneva.

In support of her plea of discrimination she adds that on the expiry of his contract it gave him a six-month extension for the sole purpose of sending him on a peace-keeping mission. Yet in a similar situation in 1994, when the Office of Human Resources Management of the United Nations had selected her for a peace-keeping mission while she was on special leave without pay, the Director-General had refused to let her go despite his earlier assurances that UNIDO would continue to help her to find employment elsewhere. The post of chief of Public Information was then filled, on 1 September 1995, by promoting another staff member, junior to the complainant, who had been promoted to P.5 only in early 1994.

11. UNIDO has not denied any of those allegations. It maintains that the recruitment took place at a time when the complainant had ceased to be a staff member. Although originally she had been put on special leave until 31 March 1995, it changed the date because she wanted to withdraw her contributions from the United Nations Joint Staff Pension Fund: by a letter dated 13 September 1994 the Director of Personnel Services informed her that the Director-General had agreed to her request that the date of expiry of her special leave be changed to 31 July 1994. UNIDO argues that in consequence it cannot have violated any of her rights by a decision taken on 1 September 1994. By then she was no longer a staff member and, even if she had still been on special leave at that date, yet "in the light of a lawful agreed termination, there [were] no rights of the Complainant ... that could have been violated by appointing an outside male to her former post". In the Organization's submission the impugned appointment did not amount to any failure to observe the terms of her employment; she would have been estopped from making such a claim; and her complaint is therefore irreceivable.

12. On the merits UNIDO points out that there were eighteen candidates, including four internal ones, and that the successful candidate was "selected by a lawful discretionary decision as the candidate best suited for the post": there was no "gender discrimination".

13. UNIDO does not say that the complainant was one of the four internal candidates or that she was treated as if she were such a candidate. Indeed its contentions that she had ceased to be a staff member when the impugned appointment was made on 1 September 1994 and that because of the agreed termination she had no rights that could have been violated indicate that it did not regard her as an internal candidate. Further, while it pleads that the selected candidate was the "best suited" for the post, it does

not contend that his qualifications were better than hers. The Tribunal must therefore infer that her qualifications were at least equal to his but that she was not given preference over him.

14. The question then is: was the complainant a staff member at the material time? The selection process was completed by 1 September 1994. As far as the selection committee was concerned the date of expiry of her special leave was, even on 1 September 1994, still 31 March 1995 and had not yet been advanced; so to all intents and purposes she remained a staff member throughout the selection process. At the date at which that committee made the recommendation that formed the basis of the impugned decision it had no right or power to deny the complainant preference under Rule 103.12(a)(ii). To do so was thus in breach of her rights as a staff member, and the breach was not removed by the subsequent change, on 13 September 1994, in the date of expiry of her leave. Although the change was retroactive it could not affect the process of selection, which had by then been concluded.

15. Particularly in view of the drastic impact that the staff reduction exercise of 1993 had on women holding senior posts in the Professional category, UNIDO's professed policy of increasing the number of women staff at all levels required at least that, other things being equal, it should give preference to applications from women; indeed encouraging women to apply was consistent only with their right to such preference. For the reasons set out in 13 above the Tribunal assumes that the complainant's qualifications were at least equal to those of the selected candidate and holds that she was not given preference over him.

16. The Tribunal further holds that the "agreed termination" did not in any way restrict her rights under the Staff Rules, while she remained a staff member, to preference over an outside male candidate in any future competition, where qualifications were equal.

17. As for the special panel set up to deal with allegations of discrimination, neither the Joint Appeals Board nor UNIDO cites any provision of the Staff Rules which compels recourse to that panel. The complainant's failure to put her grievance to it does not make her complaint irreceivable. Where a matter is otherwise within its jurisdiction the Tribunal can and will entertain related allegations of discrimination.

18. The conclusion is that the denial of preference to the complainant was a violation of Rule 103.12(a)(ii) and of her rights as a woman candidate

and contrary to the declared policy of UNIDO and to the terms of the vacancy notice. Not only is the complaint receivable but it succeeds on the merits. So it is unnecessary to take up any of her other pleas.

19. Since the post in question is now held by someone else the Tribunal makes her awards of damages which it sets *ex aequo et bono* at 45,000 United States dollars for material injury and 25,000 dollars for moral injury. She is also awarded a sum in costs.

DECISION

For the above reasons,

1. UNIDO shall pay the complainant damages in the amounts of 45,000 United States dollars for material injury and 25,000 dollars for moral injury.
2. It shall pay her 1,000 dollars in costs.
3. All her other claims are dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

Mella Carroll

MELLA CARROLL

MARK FERNANDO

JAMES K. HUGESSEN

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

EIGHTY-FOURTH SESSION

***In re* Broere-Moore (No. 6)** **Judgment 1707**

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mrs. Sylvia Broere-Moore against the United Nations Industrial Development Organization (UNIDO) on 16 August 1996 and corrected on 15 October, UNIDO's reply of 20 January 1997, the complainant's rejoinder of 30 April and the Organization's surrejoinder of 11 August 1997;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant's career in UNIDO is summed up under A in Judgment 1483 of 1 February 1996 on her first complaint. By a letter of 6 January 1995 to the chief of the Recruitment Section she applied for the post of Director of the Organization's Office in New York, announced in notice of vacancy, No. LVA 94/033. In a letter of 29 June 1995 a recruitment officer told her that she had not been successful.

By a letter of 17 August 1995 she asked the Director-General to review the decision not to appoint her. In a reply dated 8 September the Director of the Personnel Services Division told her on the Director-General's behalf that review was unwarranted because the rejection of her candidature was unrelated to the terms of her appointment.

By a letter of 31 October she lodged an appeal with the Joint Appeals Board. In its report of 4 April 1996 the Board recommended rejecting her appeal as irreceivable for want of an "administrative decision" on the terms of her appointment. By a letter of 2 May the Director-General told the secretary of the Board that he had decided to endorse its recommendation. She got notice of that decision on 20 May 1996, and she is challenging it.

B. The complainant submits that rejecting her candidature was unlawful. She relies on the text of "binding instructions" which the Secretary-General of the United Nations sent to its senior officers on 27 March 1995 about enhancing the status of women. As a qualified inside candidate she was entitled to priority over the man who was appointed.

She wants the Tribunal to order UNIDO to "comply with the binding instructions, declarations and resolutions concerning employment of senior women in the Common UN system by compensating its administrative decision to appoint a male candidate to Post No. LVA-94/033 and not to offer [her] the post or equivalent employment". She also claims costs.

C. UNIDO replies that her complaint is irreceivable. Her appointment having expired on 31 July 1994, she had already left the Organization at the material time and so it was no breach of the terms of her appointment to reject her candidature. That was not an appealable decision within the meaning of Staff Rule 112.01.

On the merits UNIDO observes that the "binding instructions" she relies on do not confer on her any right to appointment. Besides, they apply only to serving staff of organisations in the common system, whereas she was no longer in UNIDO's employ.

D. In her rejoinder the complainant submits that the Organization's arguments on receivability and the merits rest on the mistaken assumption that neither the provisions for appeal in Rule 112.01 nor special measures to achieve sexual equality in the United Nations applied to former officials. It would be "logical and just" for the Tribunal to rule on cases of discrimination according to "general principles" of international law and regardless of "local administrative practice, discretionary decisions, and staff reduction".

E. In its surrejoinder the Organization presses its pleas, the complainant's rejoinder being just a restatement of her earlier arguments. Instructions issued in the United Nations and other organisations are not binding on UNIDO, which is a distinct entity in law.

CONSIDERATIONS

1. The complainant joined UNIDO as chief of its Public Relations and Information Section at grade P.5 on a fixed-term appointment that began on 19 May 1992. Her appointment, which was for two years, was prematurely terminated in the course of a staff-reduction exercise and by an "agreed termination" dated 30 November 1993 under Staff Regulation 10.3(c). She challenged the termination in her first complaint, which the Tribunal dismissed in Judgment 1483.

2. One of the terms of termination was that she was to be on special leave without pay from 1 January 1994 to 31 March 1995. But because she wished to withdraw earlier her contributions from the United Nations Joint Staff Pension Fund, she asked that the date of expiry of her special leave be advanced to 31 July 1994. On 13 September 1994 UNIDO informed her that it agreed to that change in date.

3. On 13 December 1994 UNIDO advertised the post of Director of its Office in New York, which was graded D.1. The complainant applied on 6 January 1995. Having become aware that UNIDO had appointed a man instead, she asked in a letter of 17 August 1995 for review of the appointment. On 8 September the Director-General refused review on the grounds that selecting someone else for the post did not involve any breach of the terms of her own appointment.

4. On appeal the Joint Appeals Board held that the complainant was no longer a staff member, that she was entitled neither to reinstatement nor to re-employment within the meaning of Staff Rule 103.03, and that her appeal was irreceivable because it did not challenge an administrative decision within the meaning of Staff Rule 112.01.

5. In this, her sixth complaint, she is asking that UNIDO be ordered "to comply with the binding instructions, declarations and resolutions concerning employment of senior women in the Common [United Nations] system by compensating its administrative decision to appoint a male candidate to post No. LVA-94/033 and not to offer [her] the post or equivalent employment, when [her] qualifications matched those of this post and other vacant posts".

6. The Organization contends that, having ceased to be a staff member by the time the post was advertised, the complainant was not entitled to preference as an internal candidate under Rule 103.12(a)(ii). She is relying, however, on a statement which the Administrative Committee on

Coordination (ACC) made on 27 March 1995 under the heading "Status of Women in the Secretariats of the United Nations System" and in which it said that consideration would be given to "the feasibility of treating all women staff members of common system organizations as internal candidates in applying for vacant posts in any organization of the system". In support of her claim to preference over men she also quotes extensively from an administrative instruction, No. ST/AI/412 dated 5 January 1996, issued to the staff by the Under-Secretary-General of the United Nations for Administration and Management and headed "Special measures for the achievement of gender equality".

7. Having ceased to be a staff member long before the competition, the complainant was not an internal candidate, and so her complaint does not raise any issue relating to the observance of the terms of her appointment. Her complaint is therefore devoid of merit.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

Mella Carroll

MELLA CARROLL

MARK FERNANDO

JAMES K. HUGESSEN

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-FOURTH SESSION

***In re* Broere-Moore (No. 7)** **Judgment 1708**

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Mrs. Sylvia Broere-Moore against the United Nations Industrial Development Organization (UNIDO) on 16 August 1996 and corrected on 15 October, UNIDO's reply of 20 January 1997, the complainant's rejoinder of 30 April and the Organization's surrejoinder of 11 August 1997;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Judgment 1483 of 1 February 1996, on her first complaint, sums up under A the complainant's career with UNIDO, which she left on 30 November 1993 by "agreed termination". In a memorandum of 22 December 1993 a personnel officer set out her terminal entitlements and said that the Organization would grant her the costs of repatriation either to France, where it had recruited her, or to the Netherlands, where she had been taking home leave, whichever country she might prefer. On 23 December it issued a form authorising her to travel to the Netherlands. But at her request it changed the destination to France and stipulated on another form, which the authorising officer signed on 3 May 1994, that she would have to bear the costs of storing her personal effects and household goods in France.

In a letter dated 3 July 1995 to the Managing Director of the Division of Administration she claimed the costs of travel for her two sons from

England, where they had just come down from the university, to France. She also put in a bill for 22,425 French francs for storing personal effects and household goods at Ferney-Voltaire, in France, just over the Swiss border from Geneva, from 1 September 1994 to 14 April 1995: she was claiming that amount as part of her "removal" expenses. By a reply of 11 July 1995 the personnel officer told her that since she had exhausted her entitlement to the costs of removal UNIDO would pay the costs neither of her sons' travel and removal from England nor those of storage, which, as it had told her in May 1994, she herself would have to pay for.

In a letter of 17 August 1995 she asked the Director-General to review the decision to refuse her claims to recovery of the cost of "transport of my family's household goods and personnel effects, including that of my two sons". In a reply dated 8 September the Director of the Personnel Services Division confirmed on the Director-General's behalf that UNIDO would not be paying her the amounts.

In a letter of 31 October she lodged an appeal with the Joint Appeals Board. In its report of 4 April 1996 the Board recommended rejecting her appeal as devoid of merit. By a letter of 2 May 1996 the Director-General told the secretary of the Board that he had decided to do so. She received the text of that decision, the one she is impugning, on 20 May 1996.

B. The complainant submits that the impugned decision is unlawful. She pleads breach of promises by the Director-General and by the Director of the Personnel Services Division: they knew that she had no fixed abode and would have to store her things somewhere while looking for another job. She blames the undue hardship she says she suffered on "UNIDO's premature and illegal termination" of her appointment.

She seeks the quashing of the impugned decision and full reimbursement of her removal expenses. She also claims an award of costs.

C. UNIDO replies that her complaint is in part irreceivable and in any event devoid of merit. Her claim to the refund of storage costs is time-barred since she failed, within the 60-day time limit set in Staff Rule 112.02, to seek review of the decision on the travel authorisation form she received in May 1994.

Subsidiarily, the claim is unfounded. There is no provision in the rules for UNIDO to pay storage costs to a company with which a staff member has made private arrangements. Far from promising to do so the Organization expressly said in May 1994 that she would have to bear the costs herself. Her plea of undue hardship rests on her "usual" allegations of unlawful termination of her appointment: it is *res judicata*. As to her claim to the refund of the costs of her sons' travel, she had already exhausted her entitlements.

D. In her rejoinder the complainant seeks to refute UNIDO's pleas on receivability and on the merits. In her submission the Administration knew full well that it would have to make an exception to meet the costs of storage, and it would have been "perfectly reasonable" to do so. The merits of her case against termination are not *res judicata* because the Tribunal's ruling was confined to receivability.

E. In its surrejoinder the Organization presses its pleas and comments on points she raises in her rejoinder. It explains that in the negotiations that resulted in agreed termination it said it would not be paying storage costs.

CONSIDERATIONS

1. On 19 May 1992 the complainant joined UNIDO as chief of its Public Relations and Information Section at grade P.5. The Organization granted her a fixed-term appointment for two years which it prematurely terminated in the course of a staff-reduction exercise, and by an "agreed termination" dated 30 November 1993, under Staff Regulation 10.3(c). In her first complaint she challenged the termination but Judgment 1483 dismissed her claims.

2. According to Staff Rule 109.01(c) she was entitled to have her household goods and other belongings transported at UNIDO's expense either to the place from which it had recruited her, Divonne-les-Bains, in France, a dozen-or-so miles from Geneva, or to Warmhuizen, in the Netherlands, where she had been taking home leave, or even to some other place of her choice provided that UNIDO would not pay her any more than the costs of transport to Divonne-les-Bains or to Warmhuizen. It issued an authorisation for transport to Warmhuizen, but she then decided to have her belongings delivered to Divonne-les-Bains instead, after having them stored for some time at Ferney-Voltaire on the way. UNIDO issued an amended authorisation on 3 May 1994 for transport to Divonne-les-Bains: it stated that she herself was to bear the costs of storage at Ferney-Voltaire.

3. In May 1994 UNIDO authorised a firm of removers to transport her goods and promptly settled its bill, which came to 55,729 French francs, for delivering them from Vienna to Divonne-les-Bains. Over a year later, by a letter dated 3 July 1995, she claimed the payment of a bill for 22,425 francs from the same firm for several months' storage at Ferney-Voltaire, which she herself had arranged. UNIDO refused; she sought administrative review and, review being refused, appealed to the Joint Appeals Board. The Board recommended rejecting her appeal and the Director-General did so.

4. UNIDO contends that her complaint is irreceivable on the grounds that the grant of the authorisation to her on 3 May 1994 constituted the communication of an administrative decision that the costs of storage would not be reimbursed and if she saw that as a breach of the terms of her appointment she should have sought review within the time limit of sixty days in Staff Rule 112.02. Further, paragraph 3(e) of Appendix H to the Staff Rules provides that the costs of storage shall not be reimbursed "unless, in the opinion of the Director-General, they are directly incidental to the transportation of the consignment". Here the storage, which was for several months, was clearly not "directly incidental to the transportation".

5. The complainant argues that since her belongings were delivered to her only on 15 April 1995 her claim to reimbursement, which she made on 3 July 1995, was timely. The decision she was contesting was the reply dated 11 July 1995. In the correspondence leading up to the "agreed termination" she had repeatedly referred to the provisional storage which the sudden termination of her appointment would require. So UNIDO was fully aware of the need for it and knew that it would have to make an exception in her case.

6. Although she had raised the problem of storage, the "agreed termination" made no provision for the matter and the Staff Rules did not entitle her to the costs. If she wanted the Director-General, in the exercise of whatever discretion he might have had, to make an exception for her, she should have asked him to do so before she arranged to have her goods stored, not one year afterwards. The conclusion is that she is not entitled to reimbursement of the costs.

7. UNIDO informed her on 3 May 1994 that she was not entitled to them and its letter of 11 July 1995 was no more than confirmation of that decision. Her complaint is therefore irreceivable because she failed to have recourse to her internal remedies in time and so to exhaust the internal means of redress as Article VII(1) of the Tribunal's Statute required her to do.

8. In her letter of 3 July 1995 she also asked for travel and removal costs for her two sons. That claim too was refused on 11 July 1995, but she has not pursued it before the Tribunal.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

Mella Carroll

MELLA CARROLL

MARK FERNANDO

JAMES K. HUGESSEN

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation, the French text alone being authoritative.

EIGHTY-FOURTH SESSION

In re McLean (No. 4)

Judgment 1709

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr. Gregor Adrian McLean against the European Patent Organisation (EPO) on 18 December 1996, the EPO's reply of 21 March 1997, the complainant's rejoinder of 20 May and the Organisation's surrejoinder of 24 June 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case are to be found under A in Judgments 1433 and 1493 on Mr. McLean's first and second complaints against the EPO. The complainant is employed at the European Patent Office, the EPO's secretariat, in Munich. At the material time he held a grade A4 appointment.

In December 1994 his wife and son flew to Australia on home leave. They left from London. He himself went, again by air, in June 1995, but from Munich. Both they and he travelled in business class but on airline tickets bought on what is known as the "grey" market at a total cost of 15,123.36 German marks. That was less than the cost of "open" economy-class tickets, ones that set no date of return. In a letter of 25 July 1995 he asked the Administration to refund the cost of the three tickets. By a letter of 3 August 1995 the Remuneration and Pensions Department answered that he would be paid in line with a decision of 29 July 1994 which entitled him to no more than 50 per cent of the cost of business-class tickets.

By a letter of 11 August 1995 he filed an internal appeal with the Director of Personnel Administration on the grounds that the Office was in breach of Article 79(3) b) of the Service Regulations which entitles staff to reimbursement of "the price of a tourist economy class ticket". By a letter of 11 September the Director of Staff Policy informed him that proceedings in his internal appeal were stayed pending the Tribunal's ruling on his second complaint, which was about a similar issue. On 1 February 1996 Judgment 1493 dismissed that complaint. On 6 February he wrote to the chairman of the Appeals Committee confirming his intention of pressing his appeal. In its report of 22 August the Committee recommended rejecting it. The President of the Office endorsed the recommendation and the Director of Staff Policy, who in the meantime had become Director of Staff Development, so informed the complainant in a letter of 4 October 1996, the decision he is impugning.

B. The complainant submits that the Committee's recommendation shows several mistakes of fact and one mistake of law. He asserts that he was unable to get lower fares because to do so he would have had to book months earlier. Besides, because of an ailment he needs a degree of comfort that he would not have had in economy class. Each of the business-class tickets cost less than the economy-class fare. He contends that the ceiling of 50 per cent of a business-class fare has no basis in law. He cites a report which auditors made in 1987 and which was critical of the EPO's broad interpretation of the Service Regulations and recommended encouraging staff to travel as cheaply as they could. The complainant submits that by buying airline tickets for less than the economy class fare he was acting in line with the auditors' recommendation.

What he claims in substance is full refund of the cost of the three airline tickets and an award of 2,000 German marks in costs.

C. In its reply the Organisation submits that the complaint is devoid of merit and should be dismissed. The complainant's case is not an exception: he was reimbursed on the strength of the decision of 29 July 1994, which confirmed the practice followed since July 1990. The Appeals Committee found the practice lawful, and it is fully in keeping with the policy of saving money. It challenges his assertion that he could not get cheaper tickets. Since his wife and son did not leave from Munich, his claim to the cost of their tickets is in breach of Article 80(3) c) of the Service Regulations.

D. In his rejoinder the complainant rebuts the Organisation's arguments. He asks it to prove that the decision of 29 July 1994 confirms actual practice since July 1990. He presses his pleas.

E. The Organisation finds nothing in his rejoinder to make it change its position. It pleads further in support of its contention that the decision of 29 July 1994 confirms actual practice. Lastly, it submits that the complainant's ailment did not warrant his buying a dearer ticket.

CONSIDERATIONS

1. This is Mr. McLean's fourth complaint about home leave. He submits that under Article 79(3) b) of the Service Regulations he is entitled to refund of the cost of three economy-class tickets for travel by air from Munich to Sydney and back for himself and his wife and son. He paid 15,123.36 German marks for the journey and the EPO has paid back only 13,405.50 marks. He claims the difference: 1,717.86 marks.

2. Article 79(3) reads:

> "A permanent employee travelling by air shall be entitled to reimbursement of:
>
> a) the price of a first class ticket on flights exceeding six hours if he is of grade A7 or A6,
>
> b) the price of a tourist economy class ticket in all other cases."

3. The complainant is claiming under 79(3) b). He says that the price of an economy-class ticket for travel to Sydney and back is 7,703 marks but he wants reimbursement of the fare he actually paid, which came to less.

4. The EPO replies that it ordinarily construes 79(3) b) to mean that it must pay the fare that is "as cheap as possible", to quote its auditors' report for 1987. So it told the complainant by a letter of 29 July 1994 that it would meet his travel costs up to half the cost of business-class tickets unless tickets were unobtainable on the "free market". It says that fares vary for travel to Australia but economy-class ones are usually to be had at half the price of business class. In support of that contention it produces a list of fares for travel from Frankfurt to Sydney and back by three companies: Qantas, Air New Zealand and Singapore Airlines. For stays of over six days the fares range from 2,000 to 3,400 marks. Since the fare for air travel in economy class from Munich to Frankfurt and back is 300 at the most, the journey to Sydney in economy class ought to have cost less than 3,700 for each passenger, whereas the refund he got came to 4,468.50 for each.

5. The complainant says that a return economy-class ticket costs 7,703 marks. But that is the "open-ended" rate, and he fails to explain satisfactorily why he should be paid that rate for travel on home leave. The rates quoted by the airlines the EPO mentions also apply to economy class, and he has not put forward any convincing reason why he should not have chosen one of those companies.

6. The ailment which he says made it hard for him to travel in economy class did not entitle him to any exception to 79(3) b).

7. He asks the Tribunal to rule that the Organisation's position in its letter of 29 July 1994 offends against 79(3) b). But the Tribunal need not rule on that issue. All it need say is that with the sum of 13,405.50 marks that he has had from the Organisation he and his wife and son could have bought economy-class tickets to Sydney and back on home leave.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

MICHEL GENTOT JULIO BARBERIS SEYDOU BA

A.B. GARDNER

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FOURTH SESSION

***In re* Pary (No. 6)** **Judgment 1710**

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr. Lazaro Pary against the World Intellectual Property Organization (WIPO) on 23 December 1996 and corrected on 10 February 1997, WIPO's reply of 12 March, the complainant's rejoinder of 30 May and the Organization's letter of 9 June 1997 informing the Registrar of the Tribunal that it would not be entering a surrejoinder;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having considered the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Some information about the complainant's career with WIPO appears in Judgments 1179 and 1437 on his first and third complaints. At the time material to this case he was a messenger in the Organization's Conference, Communications and Procurement Section. He left the Organization on 30 September 1996.

He sent the Director General a letter on 18 December 1995 to which he appended a "confidential report" that he had written accusing some of his colleagues of unwarranted criticism of his work, libel and slander, racist insults, physical threats and attempts at assault. He asked the Director General to put a stop to such behaviour on the grounds that it was harming his health. He got no reply.

On 1 May 1996 the Director of the Personnel Division wrote to him on the Director General's behalf offering to end his appointment as from 30 September 1996 "in the interest of both sides" and to pay him, in accordance with Staff Regulation 9.6, a termination indemnity equivalent to eighteen months' "separation remuneration". The offer was subject to his promising not to take any legal action against the Organization or its employees. The complainant signed the letter without any qualification on the same day.

His own doctor gave him a certificate on 26 September 1996 declaring him to be unfit for work for an indefinite period. He sent the Director General a second letter on 27 September to which he appended a memorandum "further to" his report of 18 December 1995. He said that there had been no inquiry into his allegations and he asked for punitive action. Again he got no reply. He has filed this complaint challenging the refusal that he infers from the Director General's silence.

B. The complainant submits that the acts with which he charges other staff members were a grave affront to his dignity and intrusion into his private life and harmed his health. His direct supervisors showed bias against him and indulgence towards the other staff and the Director General has done nothing at all to afford protection from that sort of treatment. Certificates from his doctor and several specialists show a causal link between what he had to put up with at work and his poor health, and the Organization should have found him a "suitable sedentary" job.

He seeks an award of damages for the injury to his health and for the moral injury caused by the "discriminatory and humiliating treatment" he says he suffered at the hands of the other staff members. He wants them to be dismissed. He seeks costs.

C. The Organization replies that the complaint is irreceivable. Not having exhausted his internal remedies, the complainant was not free to go straight to the Tribunal to challenge the implied rejection of his claims. In any case he failed to meet the time limits in Article VII(3) of the Tribunal's Statute: it is his claim of 18 December 1995 that is at issue, not the one of 27 September 1996, which is mere repetition. He promised not to take any action against WIPO.

In a subsidiary plea the Organization submits that the complainant has not proved his allegations. That is plain from an inquiry made after he wrote his first letter to the Director General.

The complaint being "blatantly vexatious", the Organization asks the Tribunal to award against the complainant the costs it will incur under Article IX(2) of the Annex to the Statute.

D. In his rejoinder the complainant denies any vexatious intent. He rebuts the Organization's arguments on receivability. The absence of a reply from the Director General to his claims blocked the appeal procedure and so deprived him of his internal remedies. The time limit in Article VII(3) of the Statute of the Tribunal did not start on 18 December 1995; his two requests are indistinguishable and show the same cause of action. He alleges that only "under duress" did he sign the letter of 1 May 1996 and that the right to appeal to an international administrative tribunal is inalienable. He did not know that the Organization had held an inquiry and rejects any assertion that runs counter to his own version of the facts.

He asks the Tribunal to order the Director of the United Nations Joint Medical Service to disclose the findings of the reports by his doctors and to declare WIPO's "complicity and failure to assist someone in danger" to be unlawful.

CONSIDERATIONS

1. On 18 December 1995 the complainant wrote to the Director General of WIPO asking him to "order a stop to the aggressive treatment" which he said he was being subjected to and which had "gravely damaged his physical health and emotional well-being". He described what had been going on.

He says that the Organization "paid not the slightest heed". So he wrote again on 27 September 1996 and concluded:

> "I trust that WIPO will now do what is needed to stop what has been going on, and I demand properly punitive action."

2. He says that WIPO has done nothing whatever and its silence has left him no choice but to come straight to the Tribunal. In this complaint, which he filed on 23 December 1996, he asks the Tribunal:

"(1) to order the Director General to pay him damages in whatever amount the Tribunal determines for the service-incurred injury to his health;

(2) to award him moral damages, again in an amount it sees fit, for discriminatory and humiliating treatment that has seriously impaired his physical well-being and irredeemably damaged his health;

(3) to order the Director General to dismiss the staff members he accuses of racism, racial discrimination, incitement to hatred, attempts at assault, libel and slander, and so forth;

(4) to award his costs, which no judgment has yet awarded him."

3. The facts he cites in his two letters to the Director General and in the complaint took place before 18 December 1995.

On 1 May 1996 he signed an agreement with the Organization under which he left its employ in return for an indemnity equivalent to 18 months' "salaried remuneration" reckoned under Staff Regulation 9.12bis. He waived the right to take legal action "for any reason whatever, be it against the Organization or any of its staff for matters arising in the performance of their duties, before the Appeal Board, the Administrative Tribunal of the International Labour Organization or any other national or international judicial body".

4. By such waiver he has relinquished any right to pursue his first three claims. They therefore fail.

5. His fourth claim is to costs. The Tribunal ruled on his five earlier complaints in Judgments 1179, 1265, 1437, 1500 and 1545. In four of them, Judgments 1179, 1437, 1500 and 1545, it dismissed his complaint and awarded him no costs. In Judgment 1265 it granted him 5,000 Swiss francs in costs. His fourth claim is *res judicata* and must be dismissed.

6. Although his complaint fails in its entirety, it is nevertheless only right to take note of the allegations he makes in his further memorandum sent on 26 September 1996. They are about what happened in May and June 1996. If they proved true, they would constitute a grave breach of his fundamental rights.

Though the Tribunal will not entertain charges that have prompted no internal appeal or administrative decision, it must draw WIPO's attention to the gravity of the charges.

7. In the circumstances the Tribunal disallows the Organization's counterclaim to an award of costs against the complainant.

DECISION

For the above reasons,

The complaint and WIPO's counterclaim are dismissed.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

MICHEL GENTOT JULIO BARBERIS JEAN-FRANÇOIS EGLI

A.B. GARDNER

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FOURTH SESSION

In re Lebtahi (No. 2) Judgment 1711

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs. Farida Nadia Lebtahi against the World Health Organization (WHO) on 12 March 1997, the WHO's reply of 12 June, the complainant's rejoinder of 16 September and the Organization's surrejoinder of 17 October 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Information on the complainant's career in the WHO and other material facts are set out under A in Judgment 1617 of 30 January 1997, which dismissed her complaint against a decision to extend her fixed-term appointment by only one year.

From March to June 1995 a report was made on her performance from 1 April 1994 to 31 March 1995. On the text of the report she said that she would welcome transfer to another unit, while remaining responsible for the WHO Pesticide Evaluation Scheme, known as WHOPES. In comments that he added on 10 April 1995 her first-level supervisor, the chief of the Schistosomiasis Control Unit (SCH), said that her performance and relations with others at work were below par; he recommended letting her have a transfer but withholding her within-grade increment for six months. On 31 May she challenged the impartiality of her supervisor. On 6 June her second-level supervisor, the Director of the Division of Control of Tropical Diseases (CTD), endorsed her first-level supervisor's adverse opinion of her.

In a letter of 14 June 1995 the Director cited the report and called on her to work better and to improve her relations with people both inside and outside the Organization.

In a letter dated 28 September 1995 the chief of the Administration and Staff Support Service told her that because of her unsatisfactory performance her appointment would not be extended beyond the date of expiry, 31 December 1995. That decision, he explained, was taken in the context of efforts to retrench staff before resort to the reduction-in-force procedure and came under WHO Manual paragraph II.9.265.3, which was about such procedure and which said that a fixed-term contract might be renewed only if performance proved on the whole satisfactory.

On 17 October the complainant applied to the Director-General for review. On 8 November 1995 an Assistant Director-General told her that the Director-General had rejected her request. On 27 November 1995 she lodged an appeal with the headquarters Board of Appeal.

In a report of 14 October 1996 the Board recommended upholding the decision of 28 September 1995. But it also held that the Organization had infringed Manual paragraph II.5.200, which requires supervisors to give someone whose performance is unsatisfactory "clear guidelines and assignments" to help in coming up to standard. It therefore recommended granting her, besides costs, compensation in an amount equivalent to one year's pay.

By a letter of 12 December 1996, which she is impugning, the Director-General confirmed the decision not to extend her appointment but rejected the Board's other recommendations.

B. The complainant observes that the Board of Appeal found nothing wrong with her technical qualifications. The reports on her performance up to 1995 were "sporadic". Since the period covered by the last one ended in March 1995 she had only three months instead of twelve in which to show her mettle.

She suffered from stress because the description of her post was out of date and she did not get support from the secretaries. The appointment in October 1994 of a new Director of CTD made matters worse. He did not take kindly to her filing a complaint against the WHO's refusal to review his decision to give her only another year, and she was "discriminated against time and again". Her supervisors failed to give her any suggestions or guidance for improving her work during the short extension. The new

Director was on mission much of the time. He disregarded her application for transfer. Other staff sabotaged her work.

Since her supervisors failed to give her the assistance they owed her under Manual paragraph II.5.200 the Organization's reliance on II.9.265.3 amounts to a "breach of administrative process".

She asks the Tribunal to set aside the non-renewal of her contract, order her reinstatement as at 1 January 1996 and to grant her a fair amount in moral damages. She claims costs.

C. In its reply the WHO submits that the complainant's performance and her relations with others at work were poor throughout the year of the extension despite the warnings in her last report and in the letter of 14 June 1995 from the Director of CTD. The Organization cites "instances" of her poor performance. Although the Director did have to be absent from time to time, day-to-day supervision is not expected from a second-level supervisor.

There was no settling of scores, nor discrimination nor sabotage. She suffered no more from the occasional shortage of secretaries than did other members of the Division. The Organization met all its obligations towards her and gave her straightforward instructions at all times. Under Manual paragraph II.9.265.3 it may not extend the appointment of an official whose performance is not on the whole satisfactory.

D. In her rejoinder the complainant contends that the WHO's criticism of her work was unwarranted. She produces documents that were handed out at a meeting on 24 and 25 June 1997 of CTD staff and that laud the achievements of WHOPES since her departure on 1 January 1996. The documents show that the programme's goals and activities were the same after as before that date. The WHO adduces no factual evidence to suggest that she got on badly with other staff.

E. In its surrejoinder the Organization presses its pleas. Though WHOPES may seem "on paper" to have carried on much as before after she left, in fact much of the work wound down while she was still in charge. The impugned decision rests on objective assessment of her performance and her chronic failure to work well with others.

CONSIDERATIONS

1. The record of the complainant's employment with the WHO is summed up in Judgment 1617 of 30 January 1997. The Organization extended her appointment by just a year, from 1 January to 31 December 1995, though previous contracts had been for longer. In her first complaint she impugned its decision, and the judgment dismissed the complaint.

The chief of the Administration and Staff Support Service told her by a letter of 28 September 1995 that her contract would not be extended beyond 31 December 1995. She appealed to the headquarters Board of Appeal. The upshot was that in its report of 14 October 1996 the Board recommended upholding the decision of 28 September 1995 but granting her one year's pay in compensation for the Organization's failure to discharge in full its obligations towards her. By a decision of 12 December 1996 the Director-General upheld the earlier one but refused compensation.

The complainant is seeking the quashing of that decision, reinstatement as at 1 January 1996 and the award of a fair sum in moral damages.

The Organization asks the Tribunal to dismiss the complaint.

2. As was said in Judgment 1617, the grant of a fixed-term appointment under Staff Rule 1040 confers no right to renewal. A decision not to renew a contract is discretionary and may be set aside only if it is *ultra vires* or breaks a formal or procedural rule, or shows some mistake of fact or of law or misuse of authority, neglects some material fact or draws a plainly wrong conclusion from the evidence.

So an organisation has broad discretion in deciding whether to renew. The Tribunal has but a limited power of review, and it will leave the organisation free to determine what staff it needs and how long to keep them on: see Judgment 1617 and the precedents cited therein.

3. The issue of renewal of the complainant's appointment arose in that judgment. The WHO had dropped the idea of refusing her an extension altogether on the grounds of unsatisfactory service and instead gave her one for a year — though her previous contracts had been for two — to give her the opportunity of coming up to standard. The Tribunal held that the Director-General had properly exercised his discretion. It observed that she had not in her internal appeal denied her shortcomings but had blamed them on poor conditions of work in that she had not had proper support from her supervisors and from secretarial staff. It observed that the Organization was right to rely mainly on the concurring views of some of her supervisors and

on the opinion expressed by the Board of Appeal after hearing both parties and several witnesses. The witnesses said, among other things, that her relations with others at work had been especially strained and that she had failed to cope with cuts in staff. Since her earlier appraisal reports had been good, though few and far between, the WHO was right to keep her on long enough to let her improve and so correctly exercised its discretion. Indeed the complainant herself acknowledges that that decision was not arbitrary.

All that is at issue here is whether, in the light of Judgment 1617, what happened in 1995 warranted the refusal of further extension.

4. The complainant contends that since the alleged reason for the decision she impugns is poor performance the only material provision is Staff Rule 1070. But that rule applies only where a contract is ended before the date of expiry, whereas the complainant's appointment expired at 31 December 1995 and the only choice was to extend it or not. So the WHO was right to apply Rule 1040: see Judgment 1405 (*in re* Moore) under 6. Besides, a strong line of precedent says that unsatisfactory performance or misconduct afford grounds for non-renewal: see Judgments 1405, under 3 and 4, the precedents cited in 1405, and 1441 (*in re* Sock) under 18.

According to Manual paragraph II.9.265.3, when a general reduction in force is decided upon, "no fixed-term appointment will be renewed unless the staff member's overall performance record has been satisfactory". That is the provision on which the Organization is relying, and the complainant is not challenging its decision to make a reduction in force.

The Director-General's decision is to be construed in the light of the Board's recommendation. The Board agreed that she should not have her appointment renewed; though it found her technical work quite acceptable, it held that her behaviour towards her supervisors and other staff was not and, falling short of what was expected of an international civil servant, warranted non-renewal.

5. She got on no better in 1995 than before with her supervisors and other staff. She herself admits to a "hastening decline in her relations with superiors" and to adopting towards them language and a tone that no international civil servant ought to indulge in towards colleagues, let alone people in authority. So there is no need to go in detail into all the incidents that bear that out.

As the Board said, her attitude was reflected in what she had said, for example, in letters. It was that of someone unable "to interact adequately with colleagues and to accept the hierarchical structure and working conditions of an international organisation": "the manner of [her] interactions was not in line with the conduct expected of an international civil servant".

She tries to show that things were not wholly her fault, the ones most to blame being her supervisors, who were given to harassment and quibbling. In her submission they bore her a grudge for challenging the decision to extend her appointment by just one year; it was indeed in 1995 that her appeal was before the Board — on 14 March she filed her brief and on 24 July the Board issued its report — and it may have aggravated ill feeling.

But she herself had a duty of self-control, knowing as she did that in that year she was still on trial. She explains that her behaviour was actuated by disappointment at getting neither the higher grade she had asked for nor more support from secretaries. Though the Organization took long over her application for regrading, she had already been promoted to P.4 in the spring of 1992 in the expectation that it would go through. And though there was no meeting all her demands for secretarial help her supervisors did take them into account.

At all events, even if she was at loggerheads with her supervisors she owed them respect and should have used more seemly language.

She contends, and the Organization denies, that it failed to help her enough to work better. But its main criticism was her behaviour towards others and especially her supervisors. On that score she had many warnings in 1994, when she had her contract extended by one year, in the course of the ensuing procedure, and again in 1995. She paid not the slightest heed.

The conclusion is that the Director-General did not abuse his discretion in making the findings of fact that he did and in coming to the view that her performance was unsatisfactory, that she was unlikely to do any better and that it was in the WHO's interest to let her go.

6. Since her main claim fails so do her subsidiary ones.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

A.B. GARDNER

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FOURTH SESSION

In re Aelvoet (No. 6) and others **Judgment 1712**

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr. Daniel Aelvoet, the second complaints filed by Mrs. Danielle Delbrassinne, Mr. Paul-Henri Fastenaekens and Mrs. Françoise Goovaerts, the third from Miss Marie-José Graas, the second from Mrs. Linda Lang, the third from Miss Valérie Meyer and the second complaints filed by Mrs. Marie-Laurence Smulders, Mrs. Roberte Stroobants, Mrs. Suzanne Stroobants and Mrs. Els Vanhoven against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 19 November 1996, all corrected on 11 December 1996, Eurocontrol's reply of 21 March 1997, the complainants' rejoinder of 1 July and the Agency's surrejoinder of 8 October 1997;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Staff of Eurocontrol in category C used to qualify for the payment of a fixed "typing allowance". Judgments 1403 (*in re* Tejera Hernandez), 1411 (*in re* Bidaud), 1461 (*in re* Borrello and Chant) and 1601 (*in re* Aelvoet No. 5 and others) explain on what terms such staff might qualify for the allowance and set out the background to the present case.

By office notice 19/95 of 22 December 1995 the Director General of Eurocontrol cancelled forthwith Article 4a of Rule of Application No. 7, which laid down the conditions for the grant of the allowance. The notice said: "An amount equivalent to the current allowance will continue to be paid until further notice". The first payslips to give effect to that decision went out on 27 February 1996 and covered the month of March 1996. They showed the docking of sums equivalent to the amounts paid in January and

February 1996 by way of typing allowance and the repayment of those sums in the form of "compensatory amounts". A note appended to the payslips drew attention to that repayment.

At dates ranging from 1 until 24 April 1996 the complainants lodged internal "complaints" with the Director General against their payslips for March. In a report dated 2 August 1996 the Joint Committee for Disputes declared their "complaints" devoid of merit. By identical minutes dated 21 and 23 August 1996 the Director of Human Resources told the complainants on the Director General's behalf and in the exercise of authority delegated to him that their "complaints" were rejected. Those are the decisions they are impugning.

B. The complainants' first plea is that by making rules in office notices the Director General offended against the stability of the law and against Article 100 of the Staff Regulations governing officials of the Agency, which distinguishes between such notices and implementing rules. Only the latter, they point out, need go to the Committee of Management for approval.

Secondly, they plead breach of the agreement of 9 January 1992 between Eurocontrol and the staff unions on consultation, conciliation and arbitration. That agreement says that where any general measure is taken to give effect to the Staff Regulations there must be consultation. Cancelling the allowance was such a measure; yet there was no consultation.

Thirdly, they say there was breach of their acquired rights. Citing precedent, they argue that the typing allowance was a fundamental term of employment in consideration of which they accepted Eurocontrol's offers of appointment. Indeed, like the European Communities, the Agency introduced the allowance in 1965 so as to make it easier to attract highly qualified recruits. The reasons given for dropping it are spurious because the demands made of typists were not the only justification for it. Forfeiting it will eventually cost them anything from 3.11 to 6.8 per cent of pay, according to grade. The compensatory amount comes to less anyway because it is not periodically adjusted, and it makes no difference because the grant of it is merely a transitional measure.

The complainants ask the Tribunal to "declare unlawful" office notice 19/95 of 22 December 1995, "or set it aside, or both"; quash the decisions of 21 and 23 August 1996 rejecting their "complaints"; set aside the decisions to grant them the compensatory amounts for January, February and March 1996; and order Eurocontrol to pay them the allowance as from January 1996 together with interest at the rate of 10 per cent a year on the sums due by way of allowance as from April 1996. They claim costs.

C. Eurocontrol replies that the complaints are irreceivable because they disclose no cause of action. It points out that the complainants are still getting compensatory amounts equal in value to the old allowance and the payment of them is not "transitional". Since the transitional measures it has announced have yet to be put into effect it is too soon to plead injury on that account.

In subsidiary argument on the merits Eurocontrol rejects each of the complainants' pleas. It accuses them of failing to distinguish between the nature of the Director General's decision, which was a rule, and the form of announcement, which was an office notice. Office notices are the only way of giving the staff notice of official decisions: they state the effective date of the decision and make it challengeable. In any event the Agency did put the new rule to the Committee of Management, which saw no reason to amend it.

Eurocontrol denies breach of its agreement with the staff unions. A conciliation board has settled a dispute over the scope of the agreement by approving the Agency's position, which is to exclude consultation on the contents of service rulings and office notices. Besides, the measures under challenge in this case were not general ones.

In the Agency's submission there was no breach of acquired rights: only the terms of the contract of service may confer such a right. The grant of the allowance was prescribed under the rules, and only three of the eleven complainants got letters of appointment that referred to it, one of them actually saying it was "provisional". It is because technical progress has removed the stress from typing that it was right to drop the allowance. According to Judgment 1403 the Agency was free, by means of a decision of the Director General's, to extinguish an obligation born of a broad construction of policy. The decision has caused the complainants no loss of income since they are still getting the compensatory amounts.

The Agency asks the Tribunal to award full costs against the complainants.

D. In their rejoinder the complainants say that they do have a cause of action inasmuch as the payment of the compensatory amounts is merely transitional. Besides, not being linked to the cost of living, and owing to other transitional measures already announced, it is bound to depreciate.

On the merits they observe that it would offend against Article 100 to issue a rule by means of an office notice, the status of the two not being the same in law. Besides, the way in which Rule No. 7 was put to the Committee of Management did not allow it to amend the provision.

It is not true that the conciliation board upheld the Administration's position. In fact it acknowledged that some service rulings and office notices might come under the agreement with the staff unions. The allowance was part and parcel of pay and that made it an obvious topic of consultation with the staff unions. Cancelling it was a measure taken under the Staff Regulations.

E. The Agency presses its pleas in its surrejoinder. It maintains that the office notice is the only legal instrument the Director General uses to issue a rule, of whatever sort. It was by office notice that the staff were told in 1965 that Article 4a, which brought in the allowance, was added to Rule No. 7 in the first place. Issuing an office notice did not bar the Committee of Management from reviewing the new rule.

As to the dispute over the meaning of the agreement, the conciliation board was empowered "to the exclusion of any other jurisdiction" to settle the point.

Even if the compensatory amounts were cancelled, and they are not, that would not amount to breach of a fundamental term of the complainants' employment.

CONSIDERATIONS

1. The complainants were all parties to a case – *in re* Aelvoet No. 5 and others – on which the Tribunal ruled in Judgment 1601 of 30 January 1997. Eurocontrol used to pay them a fixed allowance under Article 4a of Rule of Application No. 7 of the Staff Regulations.

2. From office notice 19/95 of 22 December 1995 they learned that Article 4a had been cancelled with immediate effect, that transitional measures for staff members who had been getting the allowance at the date of publication of the notice would be announced later, and that they would be paid equivalent amounts until further notice.

3.. Late in February 1996 they got payslips for the month of March which referred, not to the allowance, but to the compensatory amounts.

Appended was a note pointing out the change. The payslips showed both as "payments" and "deductions" sums equivalent to those paid in typing allowances for January and February.

4. The complainants lodged internal "complaints" against their payslips for March 1996 and office notice 19/95.

5. The case went to the Joint Committee for Disputes. In its report of 2 August 1996 the Committee declared it to be receivable but devoid of merit.

6. Identical minutes of 21 and 23 August 1996 signed by the Director of Human Resources on the Director General's behalf and in the exercise of authority delegated to him told them that the Director General had endorsed the Committee's report, apart from some incidental comment by the Staff Committee, and was rejecting their "complaints" as devoid of merit for the reasons stated therein.

7. The present complaints, filed on 19 November 1996, raise the same issues of fact and of law and so may be joined to form the subject of a single judgment.

Receivability

8. Eurocontrol submits that the complaints show no cause of action and are therefore irreceivable. The cause of action must, it says, be real, and not just hypothetical. The payslips dated 27 February 1996 for March 1996 which the complainants are challenging have caused them no injury whatever, but made it plain that in keeping with office notice 19/95 they would still get equivalent amounts, and by way of compensation, not, as they make out, under any "transitional measure".

9. The complainants retort that they do have a cause of action. To their mind, payment of the compensatory amount is just a transitional measure, and it affects them adversely not only because it is sure in time to depreciate as against what they would have earned in typing allowance, but also because the other transitional measures announced in the office notice are bound to cause them injury in the future.

10. The payslips for March reflect the Agency's decision to pay the compensatory amounts announced in office notice 19/95 instead of the allowance for January, February and March 1996. That decision did cause the complainants injury. It applied to each of them the office notice

that extinguished their right to the allowance provided for in Article 4a of Rule No. 7. And it granted them instead compensatory amounts to which – said the notice – "no annual adjustment will be made in connection with the annual remuneration adjustment". As the Tribunal has said before, there may be a cause of action even if there is no present injury: time may go by before the impugned decision causes actual injury. The necessary, yet sufficient, condition of a cause of action is a reasonable presumption that the decision will bring injury. The decision must have some present effect on the complainant's position. And in this case it does.

The conclusion is that the complaints are receivable insofar as they challenge the individual decisions in the payslips that the complainants got for January, February and March 1996.

The merits

11. There being no need to take up any of the complainants' other pleas, the Tribunal will take up only the complainants' plea of breach of the Agreement on consultation, conciliation and arbitration procedures that Eurocontrol and "the Trade Union Organisations" signed in Brussels on 9 January 1992. The plea is that there was no prior consultation with the staff unions on office notice 19/95, even though it was a matter relating to the general application of the Staff Regulations; it is therefore unlawful; and the impugned individual decisions based on it are unlawful too.

12. The agreement of 9 January 1992 provides for consultation and for conciliation and arbitration. It says:

> "These procedures shall apply only to proposals relating to the amendment of the Staff Regulations of Officials and/or the General Conditions of Employment of Servants of the Agency or relating to the general application of the provisions of the Staff Regulations or the General Conditions of Employment. In addition, under Part I only of the procedures, other matters of general interest may be discussed when:
>
> - these matters do not come within the competence of the Staff Committee and/or the Staff Committee Agents; or
> - the Staff Committee or the Staff Committee Agents so request."

13. It is common ground that the decision announced in the office notice was taken without prior consultation of the staff unions. So the material issue is whether the agreement of 9 January 1992 required it.

14. On that score Eurocontrol is mistaken. Dispute arose as to whether office notices and "service rulings" issued by the Director General under Article 100 of the Staff Regulations fell within the ambit of the agreement, and the conciliation board's report of 16 April 1996 did not put paid to the matter.

15. The report said:

> "Since the agreement does not expressly cover rules, service rulings and office notices, each of them must be looked at to see whether it amounts to general application of general provisions of the Staff Regulations or the General Conditions of Employment."

The Board then observed how hard it was to say on which sort of decisions about rules there should be consultation.

16. Article 4a of Rule No. 7 was cancelled. Thus Eurocontrol did away with the allowance which it had brought in under Article 62 of the Staff Regulations. It was the Permanent Commission that set the amount of the allowance, as it did other items of pay, under Article 64 of the Staff Regulations. The decision was therefore a general measure applying provisions of the Staff Regulations and as such covered by the agreement of 9 January 1992.

17. Since there was no consultation the measure under challenge was in breach of the agreement and the impugned individual decisions based thereon are therefore unlawful. Though any decisions taken after 1 April 1996 on the strength of the same measure would likewise be unlawful, the only decisions duly impugned are those in the payslips for January to March 1996.

DECISION

For the above reasons,

1. The Tribunal sets aside the decisions, notified in payslips dated 27 February 1996 for March 1996, to pay the complainants "compensatory amounts" for January, February and March 1996 instead of the typing allowance provided for in Article 4a of Rule No. 7 of the Staff Regulations.
2. Eurocontrol shall pay them in typing allowance for January, February and March 1996 the same sums as those it paid them in "compensatory amounts".

3. It shall pay them a total of 100,000 Belgian francs in costs.
4. Their other claims are dismissed.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

EIGHTY-FOURTH SESSION

In re Carretta, Cherubini, Eldon and Pace

Judgment 1713

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mrs. Christina Carretta, Mr. Claudio Cherubini, Mrs. Margaret Eldon and Mr. Mauro Pace against the Food and Agriculture Organization of the United Nations (FAO) on 23 August 1996 and corrected on 6 December, the FAO's single reply of 19 March 1997, the observations of 27 March from the International Civil Service Commission (ICSC), the FAO's letter of 19 June informing the Registrar of the Tribunal that it did not wish to comment on the Commission's observations, the complainants' common rejoinder of 17 July and their comments of even date on the ICSC's observations, the Organization's surrejoinder of 17 September 1997 and the Commission's final brief of 30 September 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainants are in the General Service category of staff at the FAO in Rome. According to what is known as the Flemming principle, pay of staff in that category is to be aligned with the best conditions prevailing at each duty station. The principle was first stated in 1949 by a body of experts on pay set up by the General Assembly of the United Nations. It is the cornerstone of the general "methodology" that the International Civil Service Commission follows in carrying out surveys of outside pay at the duty station and in setting scales of pay for General Service and other locally recruited staff.

The Commission revised its methodology in 1992 and set out the new version in a paper dated 14 April 1993. The material provisions read:

Paragraph 9:

> "... Once the Commission has approved a survey schedule, the Chairman of the Commission notifies the executive heads at the duty station about 10 months prior to the scheduled survey date. ... Some six to nine months prior to the survey date, representatives of the ICSC secretariat will visit the duty station to meet with the members of the Local Salary Survey Committee ..."

Paragraph 38:

> "Range minima and maxima, where available, are useful as a check on the consistency of the data on salaries actually paid. There may be situations where employer practices make it difficult to obtain data on the average of salaries actually paid in a form suitable for the analysis, for example, when the data available on actual salaries reflect groups of jobs or grades and can thus not clearly be related to the surveyed jobs. Under such circumstances, data on entry rates for the surveyed jobs should be collected for purposes of the analysis. Information should also be obtained on the maximum salary for each job matched ..."

Paragraph 42:

> "Data on the average of salaries actually paid are most appropriate for purposes of the analysis at the majority of headquarters duty stations. Since it would be inappropriate to base the analysis on a combination of actual salary data and minima and maxima, only actual average salary data should normally be used, except where such data cannot be made available in a suitable form, as described in paragraph 38 above."

Paragraph 71:

> "In cities where the local language is not a working language of the organizations, an adjustment was made previously to recognize, *inter alia*, that the outside rates relate to outside staff who work only in one language and consequentially the difficulty in recruiting local staff with appropriate language skills. As this difficulty has gradually been diminished, such amendments are no longer to be included. Should this change lead to a freeze of salaries at the two locations (Vienna and Rome) where a 'language factor' is currently granted, the Commission will consider a phased approach to the elimination of this element."

According to a timetable that the Commission approved at its 36th Session, in July and August 1992, there was to be a survey in Rome in the spring of 1994. By a letter of 2 November 1993 to the Chairman of the

Commission the Director of the FAO's Personnel Division asked whether it might be held over by about one year for administrative reasons. In a letter dated 6 December 1993 the Executive Secretary of the Commission answered that such delay might upset the timetable and suggested making the survey in March and April 1994. In a letter of 14 February 1994, however, he proposed starting in April and going on until "early fall". In a letter of 6 May the Chairman asked the Director-General to consent to that proposal and announced that if he did not the matter would have to go to the Commission. At its 40th Session, in June and July 1994, the FAO asked the Commission to postpone the collection of data from September 1994 until January 1995. The Commission decided that the reference date of the survey should be no later than November 1994, and most of the data were collected from 3 to 25 November.

In a note of 24 April 1995 to be put to the Commission at its 41st Session, in May 1995, the Organization asked it to do two things. One was to consider keeping the "language factor", which served to reward staff for proficiency in languages. The other was to use minimum and maximum figures of outside pay in setting the new scales. At the same session the Commission had before it a digest of the data for approval. In the event it decided to take average figures of outside pay instead and to phase out the language factor, which it had already reduced by one per cent in the scales in force as from 1 November 1994. On the strength of the findings of the survey it approved new scales to apply to staff in Rome.

By an administrative circular of 1 November 1995 the Assistant Director-General in charge of the Administration and Finance Department announced that as from that date the new scales would apply to the General Service category.

On 26 February 1996 the complainants lodged appeals with the Director-General against their pay slips for November 1995. They pleaded breach of Flemming and pointed out that the survey had not complied with the timetable provided for in paragraph 9 of the revised methodology. They objected to the phasing out of the language factor and to the taking of average rather than minimum and maximum figures of pay for the purposes of the survey. They asked for a final decision. By letters of 27 May 1996 the Deputy Director-General gave them notice of the Director-General's decisions, which were final, to reject their appeals. Those are the impugned decisions.

B. The complainants challenge the lawfulness of the rule in paragraph 71 of the methodology. They observe that the surveys made in Rome in 1979, 1984 and 1990 applied an adjustment on account of the language factor that added 4 per cent to General Service pay. The FAO's note of 24 April 1995 to the Commission said — they point out — that the reason for that factor was that the Organization needed staff with the additional qualification of proficiency in languages, not that it had to lure recruits with the higher pay.

The complainants challenge on two counts the Commission's manner of applying the methodology. First, they plead gross breach of the timetable in paragraph 9. Keeping to the timetable matters, they say, because surveys are complex and call for a great deal of preparation. So any lapse is an offence against Flemming.

Secondly, they submit that the employment market in Rome is such that, in keeping with paragraph 38 of the methodology, the survey ought to have taken minimum and maximum figures of pay, not average ones, which are not trustworthy. It was "perhaps" because of the tight schedule that there was time to get minimum and maximum figures from just two employers, and that was in breach of the methodology. In any event the Commission has not explained what the point is of taking the average figures. Nor did it comply with paragraph 65, which says that "the outside matching salaries should be determined on a job-by-job basis". What the FAO said in its note of 24 April 1995 was sound.

Though unable to say just how much the Commission's decisions have cost them, they plead that those decisions, when their effects are reckoned together, transgress Flemming.

They seek the quashing of the Director-General's decisions notified in the letters of 27 May 1996 and ask the Tribunal to send the case back to the Organization for the reckoning of new scales and for payment of the sums due. They claim costs.

C. In its reply the FAO submits that the reasoning that underlies paragraph 71 of the methodology is quite in line with Flemming. Though it does not agree with the Commission that finding local staff proficient in the right languages has become any easier, it sees no mistake of fact in the Commission's position.

As to the timetable, it observes that staff of the Commission came to Rome in May 1994, six months before the survey began. Besides, paragraph 9 does not require strict adherence to the timetable. Nor for that matter have the complainants shown how the Commission's timing of the survey affected the outcome.

According to paragraph 42 of the methodology the rule about taking minimum and maximum figures of pay comes into play only in exceptional circumstances. Though the Organization does not challenge the use of average figures, it says that it may for the purpose of future surveys ask the Commission to think again.

The only figure the complainants offer shows the effect of dropping the language factor. They cannot put any figure on the cumulative effect of the Commission's decisions.

D. The Commission observes that its sole purpose in applying the language factor was to make it easier for organisations with headquarters in Rome and Vienna to find staff proficient in languages other than Italian and German. The FAO failed to offer the Commission at its 41st Session any evidence in support of the view that finding such staff was still a problem.

"Resistance" by the FAO was to blame for the delay in the preparations for the survey. Besides, the complainants adduce no evidence to suggest that the delay, or for that matter the abridgment of the preparations, marred the survey.

In taking the average figures of pay it merely exercised the discretion that Article 12(1) of its Statute vests in it for making surveys.

E. In their rejoinder the complainants press their pleas. They see inconsistencies between the Organization's reply and its note of 24 April 1995 and describe its reasoning as "sophistical and dishonest".

Dropping the language factor, or even phasing it out, is a breach of Flemming and therefore unlawful. It is essential to keep to the timetable throughout.

The reason why they cannot work out the cost to them of taking average figures instead of minimum and maximum ones is that with but few exceptions the Commission took only data on average pay.

F. In comment on the Commission's brief the complainants observe that Rome differs from the headquarters of other organisations in the United Nations common system. Italian is not a working language for any of the organisations there, and the local employment market makes it hard to match jobs. The Commission is trying to iron out the differences for Rome and to bring pay down by dropping the language factor, scorning the timetable and leaving out minimum and maximum figures of pay. The whole purpose of the language factor was to make jobs comparable, not to make pay more attractive. That is why earlier surveys did not apply the language factor when bilingual jobs were matched.

G. In its surrejoinder the FAO says there is "nothing odd" about its defending its decision to act on the Commission's recommendations, whatever its earlier criticisms of them may have been. As for dropping the language factor, the General Assembly gave its approval. The Commission held to its own timetable, which in any case did not affect the findings of the survey. The view that the data on average pay were usable is one that the Commission was "at liberty to take".

H. In its final brief the Commission contends that its aim in taking the average figures was uniform application of the methodology at headquarters duty stations. Whatever injury the General Service staff may have sustained, the FAO would have been hard put to it to keep people from leaving had the loss been as serious as the complainants make out. The purpose of the language factor was to keep pay attractive.

CONSIDERATIONS

1. The Food and Agriculture Organization of the United Nations employs the complainants in the General Service category of staff at its headquarters in Rome. What they seek is the quashing of decisions taken on the Director-General's behalf rejecting their appeals against the reckoning of their pay as from November 1995.

The reckoning was based on scales that the International Civil Service Commission recommended on the strength of a survey of pay done in Rome in November 1994.

The complainants submit that the method of survey was flawed. To their mind it wrongly discounted a "language factor", worth 4 per cent of pay, that General Service staff used to get on the grounds that the language current in Rome was not one of the FAO's official languages. In the complainants' submission the method was misapplied too in that the Commission did not keep to the set timetable and took average figures of pay instead of minimum and maximum ones.

2. The canons for determining whether the Organization's decisions were lawful are common knowledge: both parties acknowledge them, and

so does the Commission in its own pleadings. Precedents are to be found, to cite but four, in Judgments 1000 (*in re* Clements and others), 1265 (*in re* Berlioz and others), 1519 (*in re* Prados and others), 1641 (*in re* Berlioz No. 2 and others). What they convey is that organisations in the "common system" of the United Nations, which the Commission is in charge of, must offer General Service staff the equivalent of the best terms of employment on offer from other employers at the duty station. The sole rider is that those terms, which include salary and other basic items of pay, need be merely "among the best in the locality without being the absolute best".

To find out what the terms of employment may be at headquarters duty stations painstaking surveys are carried out of jobs, akin to those of the organisations' own staff, that are offered by typical local employers. The Commission lays down the method of survey, and the Tribunal will say both whether the rules it sets are lawful and whether they have been complied with.

3. As the FAO acknowledges in its reply, "when it gets notice of the Commission's recommendations on salary scales it has a duty to analyse them and to give effect to them only if satisfied that they are lawful and that doing so would not impair the rights of its staff".

4. It has endorsed the Commission's stance on the procedural and substantive issues arising out of the survey of November 1994, and it is issues to do with the preparation and carrying out of the survey that have led to the present dispute. The Commission decided in 1992 that data on pay in Rome were to be garnered in the spring of 1994. But the FAO asked for a postponement of at least a year. After much keen debate the Commission consented to some postponement, but it would not go beyond November 1994, even though the FAO wanted more time both to get in touch with local employers and for reasons it said had to do with staff relations. The Commission so decreed at its 40th Session, in June and July 1994, and the survey was done from 3 to 25 November, though more data came in by the end of the year.

5. For all the urging of the Director of Personnel the staff representatives would have none of the actual survey. But they did sit on a joint advisory working group the Organization set up in November 1994. The group's terms of reference were -

> "to examine the results of the salary survey and the relevant ICSC recommendations thereon before they are submitted to the Finance Committee and, in particular, to advise the Director-General on their compatibility with

> Council Resolution 1/102 and, in particular, whether they would result in an erosion of current conditions in the light of operative paragraph 3 of the above-mentioned Council Resolution".

The group met from time to time in March and April 1995. Most of its recommendations found their way into a note of 24 April 1995 that the FAO put to the Commission at a session, its 41st, that it held in Montreal in May 1995. The note argued that, the employment market in Rome being what it was, the Commission ought in its surveys to go on taking the minimum and maximum figures of pay, instead of average ones, for comparable jobs. It ought, too, to continue to apply the "language factor" to the pay of General Service staff at Rome and other duty stations where the local language was not one that the Organization used. The Commission yielded on neither point. It took average figures of pay in working out the new scales, and it started, as it had already decided, to phase out the language factor by cutting the 4 per cent adjustment for that factor by one per cent, the other three to go at the rate of one a year.

6. The group's final report said how unhappy both management and staff were at the Commission's approach. But the Council of the FAO eventually let the scales through, and the Director of Personnel sent out a staff circular on 1 November 1995 announcing them. Each of the complainants protested on 26 February 1996 in an appeal against the amount of pay as from November 1995 and is now impugning the Director-General's decision of 27 May 1996 to reject that appeal.

7. The first issue is the complainants' plea that the timetable for the survey done in Rome in 1994 was disregarded and that, if so, the whole survey is null and void. They are relying on paragraph 9 of the Commission's "methodology" as revised at its 37th Session in March 1993. The paragraph reads:

> "9. An initial preparatory meeting should normally be held several months prior to the survey reference date. Once the Commission has approved a survey schedule, the Chairman of the Commission notifies the executive heads at the duty station about 10 months prior to the scheduled survey date. Upon this notification the lead agency at the duty station should establish a local salary survey committee, composed of representatives of administration and staff ... Some six to nine months prior to the survey date, representatives of the ICSC secretariat will visit the duty station to meet with the members of the Local Salary Survey Committee ..."

The preparatory phase, which the text of the methodology calls "essential", did fall short of the Commission's own "survey schedule". The Chairman of the Commission was supposed to give the FAO ten months' notice of the start of the survey, and six to nine months were to go by between the meetings of representatives of the Commission's secretariat with members of the Local Salary Survey Committee and the start of the survey. The complainants have no trouble in showing that neither requirement was met.

Though a great pity, those lapses scarcely seem fatal. For one thing, the time limits in the schedule were not binding. For another, there is no evidence to suggest that the survey suffered for any haste in the orchestration of it. Though it would no doubt have been better had the staff joined in, neither Organization nor Commission was to blame for their refusing to be represented on the Local Salary Survey Committee unless the dates were changed. Besides, everyone had long known there was to be a survey in Rome in 1994, and the delay in setting the exact date was attributable to discussions and the raising of objections by the Organization and its staff. Yet members of the Commission's secretariat had started the preliminaries as early as May 1994, even before it had given notice of the chosen date. The conclusion is that the scheduling of the survey shows no fatal flaw.

8. The complainants' second plea about breach of the methodology is that the scales were based on average figures of pay of categories of employees in Rome: the survey should, they say, have taken minimum and maximum figures instead. The FAO is no longer challenging the Commission's stance on the issue. But its note of 24 April 1995 stated serious misgivings. It argued that one peculiarity of the employment market in Rome was that employers ordinarily promoted staff, sometimes as a matter of course, even if their duties did not change, whereas the United Nations system preferred the grading of posts. The effect was, said the FAO, that the average figures are meaningless; taking the figures of starting pay and maximum pay would give a more objective standard of comparison for the purpose of setting the FAO's scales.

What makes the argument the more compelling is that the Commission had taken minimum and maximum figures in earlier surveys. But the Organization does not press the point and the Commission strongly demurs. It concedes that the employment market in Rome does make comparison harder, but it maintains that the average figures are the best ones and observes that the local employers it approached were able to give them. The methodology as revised in 1992 says that minimum and maximum figures shall be taken only where that is "necessitated by local conditions", and the Commission contends that at the time of the survey in Rome it was not.

In choosing figures of local pay for the purpose of applying Flemming there can be no single hard-and-fast approach. As was held in Judgment 1265, the Commission must be allowed some discretion over method, even though the Tribunal will still review the exercise of it. The decision impugned may not stand if, say, it overlooks or misconstrues some particular factor, or if some method is applied for the wilful contrivance of lower figures of local pay, or if corners are cut for the sake of saving time, but to the detriment of staff interests.

The complainants do not contend, let alone prove, that the purpose of taking average figures was to contrive any cut in pay for FAO staff and there is no circumstantial evidence to suggest that the choice of method was the outcome of haste in carrying out the survey. Indeed the evidence is that the Commission was in doubt until the eleventh hour about the sort of figures to take. Though it eventually went against the Organization's wishes it did so in the belief that "the use of data on remuneration actually paid to staff, i.e. average salary data, although not perfect, was more objective than using constructed minima and maxima which required making several assumptions". There was nothing obviously wrong with that exercise of its discretion.

9. The complainants' third plea is not about the Commission's manner of applying the revised methodology of 1992 but about the lawfulness of a provision thereof that it applied.

For years the methodology called for an adjustment to pay in recognition of proficiency in languages. The Commission explained why in a statement that dates back to 1984:

> "The Commission is aware that Rome is one of the headquarters locations where the local language is not one of the official working languages of FAO and IFAD [International Fund for Agricultural Development]. As a result, most of the locally recruited staff members working for these organizations have to learn an additional language, i.e. English or French. The Commission has recognized that this is an additional qualification which is required to obtain employment with FAO and IFAD but is not a requirement, in general, in the Rome labour market and should, therefore, be compensated for in some way."

Likewise the methodology the Commission approved in 1988 said under 64:

> "In cities where the local language is not a working language of the organizations, it would be reasonable to fix the United Nations pay scales at a level slightly higher than best prevailing rates outside, on the understanding that most United Nations staff in the relevant categories are in fact required to use a non-local language and in so far as the outside rates relate to outside staff who work only in the local language".

10. But the methodology of 1992 changed tack as to the application of the language factor in Rome and other duty stations where the local language is not one of the working languages. Paragraph 71 of it reads:

> "In cities where the local language is not a working language of the organizations an adjustment was made previously to recognize, *inter alia*, that the outside rates relate to outside staff who work only in one language and consequentially the difficulty in recruiting local staff with appropriate language skills. As this difficulty has gradually been diminished, such amendments are no longer to be included."

11. In keeping with the new rules the Commission decided, after spirited discussion with the Organization, to "phase out" the extra 4 per cent of pay granted to General Service staff for proficiency in languages. It said:

> "The scale with an effective date of November 1994 already included a deduction of one percentage point from this factor. A similar one percentage point deduction should be made from future interim adjustments, so as to ensure that the four percentage point language factor was eliminated by the time of the next survey."

12. The complainants see that change as unlawful. They argue that greater ease in recruitment, which experience did not bear out, was a bad reason for it. In any event, they say, the purpose of Flemming as applied in earlier versions of the methodology was not to attract bilingual staff and keep them in the Organization's employ but to ensure that they were paid at least as much as local employees in like jobs with due regard to such qualifications as proficiency in languages.

13. The Commission and the FAO, again in tandem, retort that the whole point of Flemming is that international organisations need to find, and to keep, people who meet the highest standards of efficiency, competence and integrity. The Commission adds, however, that the FAO "had not proved that posts requiring special language skills on which it had appointed non-local officials might have been filled locally by means of the language adjustment". It concludes that there are no objections to the rule, which it has made in the exercise of its discretion.

14. First and foremost, the manner of applying Flemming does not turn on such variables as the desire of staff to keep their jobs or the ease or difficulty of finding good local recruits. What Flemming ordains is that General Service staff shall have pay and other terms of employment that match the best on offer at their duty station. The FAO's note of 24 April 1995 failed to persuade the Commission. Yet it made a telling point. It is right to adjust pay by a language factor when jobs that do not require proficiency in a second language are matched with jobs that do. But it is wrong so to adjust pay when the matching is with outside posts that do require proficiency in a second language and that requirement is not compensated. "In other words", as the FAO put it at the time, "it is the practice prevailing in the local market that determines whether this adjustment should be made or not".

Here there is a second point to be made. The FAO and Commission alike make out that it has become easier to find in Rome staff proficient in one of the Organization's working languages. The contention is gratuitous. There was no obvious change in that regard between 1988, when the methodology did prescribe the language factor — and gave good reasons for it, to boot — and 1992, when it was dropped. All that is to be discerned is a mounting desire in the Commission to purge the system of what it saw as local oddities. In this case it could scarcely have proved a poser for the survey to determine whether working proficiency in a language other than Italian earned local employees a bonus. Actually one of the local employers reported that any of its employees who needed such proficiency got a bonus worth 3 per cent of pay. In Rome the only language that outside employers ordinarily demand is Italian. For want of methodical collection of data on bonuses it would — to borrow a term from the 1988 methodology — have been "reasonable" to keep a small adjustment to account for that fact.

The upshot is that the dropping, and even the phasing out, of the language factor is a decision that ignores the peculiarities of the employment market in Rome. It therefore amounts to breach of the right of General Service staff to one of the terms of employment — namely pay — that must, as was said above, be "among the best in the locality without being the absolute best". The Tribunal therefore sets aside the Director-General's decisions to reject the complainants' appeals against the reckoning of pay as from 1 November 1995 insofar as those decisions confirmed a reduction in the language factor. On all other counts, however, the decisions pass muster.

15. The complainants claim awards of damages for what they see as a steady erosion of pay and the safeguards of pay levels. They want new scales as from 1 November 1994. The claim fails. The Tribunal will not entertain any general challenge to the policies of the Commission or of the FAO: it will rule only on particular pleas from the parties. In any event it will not go into the rights and wrongs of the pay that staff got before 1 November 1995: the internal appeals and the decisions impugned in this case were about pay slips for November 1995 and the reckoning of pay since then.

16. Since the complainants succeed in part they are entitled to costs, and the Tribunal sets the amount at 50,000 French francs.

DECISION

For the above reasons,

1. The Director-General's decisions of 27 May 1996 rejecting the complainants' appeals against the reckoning of pay as from 1 November 1995 are set aside insofar as they reduce the language factor.
2. The cases are sent back for the Organization to reckon the complainants' pay in line with this judgment.
3. The FAO shall pay them a total of 50,000 French francs in costs.
4. Their other claims are dismissed.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

MICHEL GENTOT JULIO BARBERIS JEAN-FRANÇOIS EGLI

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-FOURTH SESSION

***In re* Geyer** **Judgment 1714**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Philip Gerhard Geyer against the United Nations Industrial Development Organization (UNIDO) on 17 October 1996, UNIDO's reply of 27 January 1997, the complainant's rejoinder of 28 April and the Organization's surrejoinder of 11 August 1997;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a South African who was born in 1957, joined the staff of UNIDO on 13 January 1995 under a one-year appointment as an expert in database design and implementation at grade L.4. He was assigned to Colombo, in Sri Lanka, on project No. SRL/93/010/A/01/99 to set up a network of information on industrial technology and markets. UNIDO and a Sri Lankan public company, Industrial Technology and Market Information Network Ltd. (ITMIN) were to carry out the project with funding from the United Nations Development Programme (UNDP). The description of the complainants job said that he would be "attached" to ITMIN.

By a memorandum of 31 May 1995 the board of directors of ITMIN told him that it had decided to award a contract to the IBM World Trade Corporation to "provide a total solution" and thanked him for his help in "arriving at this decision".

In a memorandum dated 20 June the complainant informed the chairman of ITMIN that he was "surprised and disturbed" by the decision because the offer from IBM was technically and commercially "unacceptable".

In line with a decision of 23 June by ITMIN's board and talks with the Sri Lankan Government and representatives of UNIDO and the UNDP the chairman invited the Secretary of the Sri Lankan Ministry of Industrial Development in a letter of 26 July to recommend removing the complainant from the project on the grounds of his "general conduct, attitude, reluctance to adapt to ... local working conditions and unco-operative manner". He also wanted the complainant to "minimise his presence" on ITMIN's premises pending official notice of his exclusion from the project.

By a memorandum of 28 July the chief technical adviser of the project gave him notice of the chairman's wishes and asked him to "cope" with them "until further notice". By a letter of 25 August the complainant informed the UNDP's resident representative that he was leaving the following week for Australia. He gave an address and telephone number there.

In a letter of 28 August the complainant asked the Director-General to terminate his appointment under Staff Regulation 10.3(d). He left Sri Lanka the next day. By a fax dated 14 September the officer in charge of the Project Personnel and Fellowship Service of the Operational Support Division (OSD/PFS) told him that the Administration was treating his communication of 28 August as resignation under Staff Rule 210.01; in another fax, dated 25 September, the officer-in-charge confirmed that and announced that UNIDO was stopping his salary as from 1 September 1995. By a letter of 28 September the complainant told the Director-General that he had neither resigned nor intended to resign.

By a minute dated 5 October the competent "backstopping officer" at UNIDO headquarters in Vienna told the officer-in-charge that the complainant's attitude was "uncooperative": he had problems adapting to work on the project and to life in Colombo.

Replying to the complainant's letter of 28 September the officer-in-charge said in a fax dated 6 October that his unauthorised departure from Sri Lanka on 29 August amounted to *de facto* separation from service for abandonment of post under Staff Regulation 10.5 which reads:

> "A staff member absent from duty without satisfactory explanation for more than 15 working days shall be considered to have abandoned his or her post

> and the staff member shall be separated from service without indemnity provided that the Organization shall make every reasonable attempt to locate such a staff member prior to his or her separation from service. The Director-General may, however, withhold the separation action if he or she is satisfied that the absence is due to circumstances beyond the staff member's control."

On 26 October the complainant left Australia for South Africa. In a fax message which he sent on 1 November to OSD/PFS from Johannesburg he asked for payment of salary for September and October. By a letter dated 20 November the head of OSD/PFS confirmed that UNIDO had terminated his appointment under Regulation 10.5 for abandonment of post on 29 August 1995.

By a letter of 12 December 1995 he lodged an appeal with the secretary of the Joint Appeals Board against "all the administrative decisions made since August 1995". In an undated report the Board recommended, among other things, reversing the decision to separate him for abandonment of post and terminating his appointment as at 11 September 1995 with payment of one month's salary in lieu of notice and of one week's pay "for each month of uncompleted service plus repatriation entitlements minus proportional adjustment of hardship allowance, assignment allowance and education grant". The Board recommended rejecting his claim to material and moral damages.

In a letter of 21 August 1996, which he impugns, the officer-in-charge told him that the Director-General had endorsed the Board's recommendations.

B. The complainant submits that the decision to terminate his appointment as at 11 September 1995 is unlawful. He never abandoned his post or neglected his duties: it was UNIDO that asked him to stay away from the office in July 1995 and kept him idle thereafter. His contract ran to 12 January 1996, when it expired. He alleges misuse of authority in the Administration's resorting to "coercion where persuasion had failed". He charges the Organization with mistakes of fact, many of them in the backstopping officer's report of 5 October 1995, and with failure to give him a hearing or issue a warning. He never got any substantive reasons why it gave him no more work. Only "prejudice or resentment" can explain the Organization's breach of good faith and duty of care.

He seeks the following relief:

> "1. Acknowledgement of appropriate and lawful completion of my contract to the end of the contract period, and issuance of a certificate of service to that effect;

2. Acknowledgement of satisfactory performance of my duties during the contract period, and issuance of a testimonial to that effect;

3. Full payment of the education grant for my daughter – as applicable to a medium-term appointment – in the amount of ZAR [South African rand] 2,125;

4. Full payment of post-adjusted salary for the period 1 September 1995 to 12 January 1996 in the amount of USD [United States dollars] 31,707;

5. Full re-imbursement of medical insurance carried by me since cessation of the payments in August 1995, equivalent to the value of my previous UNIDO medical insurance with JC van Breda, from 1 September 1995 to 12 February 1996 in the amount of USD 372;

6. Full credit for the 4 days of annual leave taken from 18 to 21 July 1995 despite having been absented from duty;

7. Full commutation payment of 25 days annual leave (30 days' entitlement minus 5 days consumed) in the amount of USD 5,933;

8. Payment of interest at a compounded rate of 12 per centum per annum on the above amounts, all of which are in arrears, calculated from due date to date of payment;

9. Removal of the Backstopping Officer's reports from my personnel file;

10. Insertion of the Judgement of the Tribunal on this matter into my personnel file;

11. Full re-imbursement of the Costs of claim in the amount of ATS [Austrian schillings] 21,740."

C. In its reply UNIDO contends that the complaint is irreceivable for failure to exhaust the available internal remedies. The complainant's statement of his claims to the Joint Appeals Board was confined to "appropriate and lawful termination" of his contract, payment of unpaid salary and allowances, compensation for moral and material injury and apologies. Since his appeal succeeded in the main with the Director-General's decision of 21 August 1996 to terminate his appointment, his claim to credit for completing his contract is a new one. His fourth and seventh claims too are much broader than those he put to the Board.

On the merits UNIDO observes that it lawfully terminated his appointment as at 11 September 1995. He himself asked the Director-General to do so as early as 28 August 1995, when he said he could "no longer work" on the project. The grant of his request was in keeping with his letter of appointment and the rules on notice and terminal entitlements. In any event his misbehaviour towards his counterparts and inability to adapt to life in Sri Lanka were not what UNIDO expects from an international expert. The technical information from the backstopping officer being objective and impartial, there was no reason to strike it from the file. Even if he had worked out his appointment, UNIDO would not have owed him payment by way of education grant because he has not provided any evidence of expenses incurred.

D. In his rejoinder the complainant seeks to clear up points of fact and rebut arguments in the reply. His internal claim was to "appropriate and lawful" termination but the decision to terminate his appointment retroactively was tainted with fatal flaws. The charge that he failed to adapt to local conditions is just an opinion and not borne out by any proper investigation. He produces evidence of education expenses he incurred for his dependent daughter, which he says he had seen no reason to submit as long as the impugned decision stood. He seeks a further 4,704 Austrian schillings in costs and presses his other claims.

E. In its surrejoinder the Organization comments on his pleas in the rejoinder. The complainant having sought the lawful termination of his contract in his internal appeal, his present claim to credit for completing his contract is contradictory and plainly irreceivable. Besides, there was nothing improper in its termination of his appointment as he had requested once it was plain that neither UNIDO nor the UNDP could solve his problems in Sri Lanka.

CONSIDERATIONS

1. The complainant joined UNIDO as an expert in database design and implementation for a UNIDO project in Sri Lanka for the establishment of an industrial technology and market information network. He received an appointment for one year, from 13 January 1995 to 12 January 1996, at grade L.4, step VI.

2. The description of the post indicated that the expert would be attached to Industrial Technology and Market Information Network Ltd (ITMIN), a Sri Lankan company that was the implementing agency for the project, and that the tasks would include participation (a) in the preparation of computer hardware and other equipment specifications as well as the identification of contractors to undertake software development and (b) in the evaluation and selection of offers received, and assistance to the chief technical adviser and the managing agent of ITMIN in making recommendations to ITMIN for final selection.

3. On 31 May 1995 ITMIN informed the complainant that it had decided to award a contract for the computer system to IBM World Trade Corporation so as to "provide a total solution". It expressed appreciation of

the assistance rendered by the three members of the Evaluation Committee, including the complainant.

4. By a memorandum dated 20 June, the complaint told ITMIN that he was "surprised and disturbed" by that decision, that "some aspects of the IBM proposal" were technically and others commercially unacceptable, and that "the agreed procedure of final negotiations with short-listed Vendors" had been "simply disregarded".

5. On 23 June the board of directors of ITMIN resolved to ask UNIDO, with the concurrence of the competent Ministry as the executing agency, to withdraw the complainant from the project, mainly on the grounds of "his general conduct, attitude, reluctance to adapt to ... local working conditions and unco-operative manner, which, if continued, [would] seriously hinder a healthy office environment, thus impeding the progress of the project". The board decided to take the matter up first with the secretary to the Sri Lankan Ministry of Industrial Development (the executing agency), the office of UNIDO/UNDP (United Nations Development Programme) in Colombo, and the chief technical adviser before making such formal request for the complainant's removal.

6. In July 1995 the representatives of UNIDO, the UNDP and the Government discussed the situation with the complainant and with ITMIN officers and sought clarifications from UNIDO's backstopping officer at headquarters in Vienna. It transpired that during the month of May there had been some concern that the specifications originally prepared by the complainant exceeded the requirements of the project and would be too costly; the complainant had revised the specifications, and fresh quotations were called for and evaluated. Consequently, differences of opinion had arisen between the complainant and other UNIDO staff. It seemed that in writing to ITMIN on 20 June 1995 to question its award of the contract to IBM - which was within its competence - he had overstepped his advisory role under the project. There had also been minor difficulties for some time in communication and personal relations between the complainant and ITMIN staff.

7. Officers of ITMIN also made allegations of corruption against the complainant but were quite unable to furnish any material in support.

8. All efforts at reconciliation failed. On 15 July 1995 ITMIN asked that the complainant be told to keep away from its premises until further notice. By a letter dated 26 July 1995 it communicated its decision to the executing agency and requested that a recommendation be made to UNIDO

for withdrawing and replacing him. However, no request for his withdrawal was made: the resident representative asked the executing agency not to do so because efforts were being made to arrive at a settlement.

9. The chief technical adviser wrote to the chairman of ITMIN on 9 August pointing out that it was not acceptable for UNIDO to keep an international expert away from work for such a long period without giving any reason; he asked ITMIN either to state its reasons or to modify its request for withdrawal of the complainant. There was no response.

10. Though there followed discussions between the complainant and UNIDO's backstopping officer, no agreement was reached. The officer suggested only that the complainant should resign on personal grounds, which he was quite unwilling to do.

11. On 25 August 1995 the complainant informed the UNDP's resident representative that he was leaving for Australia and intended to stay there until February 1996 and then return to Austria. On 28 August 1995 he wrote to the Director-General saying that it was quite clear that he could no longer work on the project and that he saw no reason to resign and could not afford to do so anyway. He asked UNIDO to consider terminating his appointment under Staff Regulation 10.3(d) as it was hardly in UNIDO's interest to pay him "for sitting at home". He also asked for an increased indemnity under Regulation 10.6(b). He cited other personal and domestic reasons why he had no further desire to remain in Sri Lanka. He gave his address and telephone and fax numbers for the place in Australia where he would be until mid-October. His letter reached UNIDO on 11 September 1995.

12. The backstopping officer sent a fax on 28 August 1995 to the acting resident representative in which he stated that he had been unable to reach the complainant by telephone; he set out UNIDO's proposals in the event of the complainant's resignation on personal grounds, namely payment of his salary for September and October and of repatriation travel and grant. The complainant left Sri Lanka early in the morning of 29 August and did not receive that fax until 5 September, in Australia.

13. By two fax messages, one dated 14 and the other 25 September, the officer in charge of the Project Personnel and Fellowship Service of the Operational Support Division (OSD/PFS) informed the complainant that UNIDO was treating his communication as a letter or resignation in terms of Staff Rule 210.01, that it accepted his resignation and that his salary payments would be stopped as from 1 September, since he had left Sri Lanka on 29 August. Reversing that position, the officer-in-charge told

him in another fax dated 6 October and the head of OSD/PFS in a letter dated 20 November that his leaving Sri Lanka amounted to abandonment of his post within the terms of Staff Regulation 10.5, reproduced under A above.

14. On appeal the Joint Appeals Board observed that the backstopping officer had confirmed to the Board that he was aware of the complainant's plan to leave Sri Lanka and that the complainant had explained his reasons by his letter of 28 August, which the UNIDO had received by 11 September, "within the 15 days specified in Staff Regulation 10.5". The Board concluded that he had not abandoned his post but that his request for termination was *de facto* resignation at 11 September, and it recommended paying his entitlements on that basis.

15. The Director-General accordingly decided that the effective date of termination of the complainant's appointment would be 11 September 1995 and that he would be paid one month's salary in lieu of notice, plus one week's salary for each month of uncompleted service and repatriation entitlements, "minus proportional adjustment of hardship allowance, and assignment grant". The officer-in-charge so informed him by a letter of 21 August 1996.

16. In his complaint to the Tribunal the complainant asks for the redress set out under eleven heads in B above.

17. The Tribunal need not consider whether there was any lapse on the complainant's part which led to ITMIN's request for his withdrawal. Even on the assumption that he was in no way to blame, his letter of 28 August 1995 puts it beyond doubt that he was no longer able to discharge his duties under his contract and indeed no longer wished to work on the project or even to remain in Sri Lanka. Thus further performance of his contract had been brought to an abrupt stop by extraneous causes for which neither he nor UNIDO, whose efforts at conciliation unfortunately proved unsuccessful, was responsible. The Tribunal holds that his contract came to an end no later than 11 September 1995, when his letter reached UNIDO. Not having worked after that day, he then ceased to be entitled to salary: see Judgments 314 (*in re* Rempp), 566 (*in re* Berte and Beslier) and 615 (*in re* Giroud and Beyer).

18. The complainant's claims to acknowledgement that he satisfactorily served for the full contract period are consequential and must fail, as must also his claims to the payment of salary up to 12 January 1996; to "commutation payment" for annual leave as if he had worked for the full

contract period, to medical insurance coverage and to the payment of interest on all the sums he claims.

19. As for the payment of education grant for his daughter, UNIDO cites paragraph (l) of Appendix E to the Staff Rules, which requires that claims be submitted in writing, and it points out that the complainant has not yet submitted any such claim. In his rejoinder the complainant admits that he kept the relevant forms and he submits copies to the Tribunal. The claim should first have been submitted to UNIDO and it is irreceivable under Article VII(1) of the Tribunal's Statute on the grounds of his failure to exhaust his internal remedies.

20. The complainant claims the removal from his personnel file of two reports which the backstopping officer had submitted. He alleges that they are "false" and "defamatory". UNIDO contends, and he denies, that they contain technical information on the project. The Tribunal rules that the reports set out the facts as perceived by that officer, and even though they may contain some inaccuracies they are neither false nor defamatory. The claim fails.

21. Finally, the complainant asks that a copy of the judgment be inserted in his personnel file. Since UNIDO says it has no objection, it is not necessary to rule on the claim.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

Mella Carroll

MELLA CARROLL

MARK FERNANDO

JAMES K. HUGESSEN

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

EIGHTY-FOURTH SESSION

In re Geyer (No. 2) — Judgment 1715

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Philip Gerhard Geyer against the United Nations Industrial Development Organization (UNIDO) on 17 October 1996, UNIDO's reply of 27 January 1997, the complainant's rejoinder of 25 March and the Organization's surrejoinder of 2 July 1997;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a South African citizen, joined UNIDO on 13 January 1995 under a one-year appointment as an expert in database design and implementation at grade L.4. He was assigned to Colombo, in Sri Lanka, on project No. SRL/93/010/A/01/99 to set up a network of information on industrial technology and markets.

On 6 June 1994 he had stated on "a personal history form" that he was "divorced". On 19 December 1994 he filled up a form headed "Status report and request for payment of dependency benefits", again saying he was "divorced" but claiming the payment of a dependency benefit for Miss Zsuzsanne Szabó, whom he called his "common-law wife". In another status report and request for payment of dependency benefits, which he signed on 19 June 1995, he said he was "married" and claimed dependency benefits for Miss Szabó as his "spouse". By a telex dated 28 August the officer in charge of the Project Personnel and Fellowship Service of the Operational Support Division (OSD/PFS) asked him for copies of the "marriage certificate" and the birth certificate of his "spouse" so that UNIDO might change the definition of his status from "divorced" and adjust his entitlements accordingly.

In the circumstances that are set out under A in Judgment 1714 on his first complaint, also delivered this day, the complainant left Colombo on 29 August 1995. On 14 September the officer-in-charge sent him a fax in New South Wales, asking him once more to substantiate his claim to the change in status.

By a letter of 12 December 1995 he lodged an appeal with the secretary of the Joint Appeals Board against "all the administrative decisions made since August 1995". In its undated report the Board recommended, among other things, that the Director-General should make him no payments for Miss Szabó but pay him other terminal entitlements, 11 September 1995 to be taken as his last day of service.

In a letter of 21 August 1996, which he impugns, the officer-in-charge told him that for want of evidence the Director-General had decided not to change the definition of his marital status from "divorced" to "married". He had also decided to terminate his appointment at 11 September 1995 and award him "repatriation entitlements minus proportional adjustment of hardship allowance, and assignment grant".

B. The complainant submits that the Director-General's refusal to change the definition of his marital status was an improper exercise of discretion. It overlooked the essential fact that he was not single and had two dependants, Miss Szabó and a daughter by his first marriage. What is more, common-law marriages are valid under Austrian law, which the Organization had told him was applicable. Though he gave UNIDO a copy of his divorce decree he did so merely to get a dependency allowance for his daughter and the text afforded no "proof" of marital status. That the Administration helped to get Miss Szabó a visa for Sri Lanka shows that it accepted her status.

He seeks the following relief:

> "1. Acknowledgement of my *de facto* marital state;
> 2. Adjustment of my salary, allowances and benefits for the full period of contract at the rates specified for members of staff with two dependants;
> 3. Full payment of the dependency allowance for my wife for the total period of contract in the amount of USD [United States dollars] 1,270;
> 4. Full payment of the assignment grant for my wife for the first fifteen days of the contract in the amount of USD 1,800;

> 5. Full re-imbursement of the costs of my wife's outbound travel equivalent to the cost of a normal business class ticket from Vienna to Colombo in the amount of ATS [Austrian schillings] 33,150;
> 6. Full re-imbursement of the costs of my repatriation travel equivalent to the cost of a business class ticket from Colombo to Vienna in the amount of ATS 33,150;
> 7. Full re-imbursement of the costs of my wife's repatriation travel equivalent to the cost of a business class ticket from Colombo to Vienna in the amount of ATS 33,150;
> 8. Full re-imbursement of the costs incurred for packing, shipping, insuring, clearing and storing my personal effects transported from Colombo to Vienna in the amount of USD 3,456 plus ATS 20,730;
> 9. Payment of interest at a compounded rate of 12 per centum per annum on the above amounts, all of which are in arrears, calculated from due date to date of payment;
> 10. Full re-imbursement of the Costs of claim in the amount of ATS 7,300."

C. In its reply UNIDO contends that the complaint is in part irreceivable and in any event devoid of merit. Claim 2, being a new one, is irreceivable because of the complainant's failure to exhaust his internal remedies. So is claim 8, to the refund of his storage costs. Claim 6 shows no cause of action: the Organization paid him the due amount on 16 October 1996 along with compensation for the packing and shipping expenses he is seeking under claim 8.

On the merits it observes that he himself reported his marital status as "divorced" and never provided it with any evidence of a change. The validity of common-law marriages under Austrian law is immaterial. Since he failed to establish, as he was required under the rules, that he was married he is not entitled to any benefits for a second dependant.

Claim 2 is also devoid of merit: UNIDO did not owe him pay for any period after termination on 11 September 1995.

Claim 8, to payment of the costs of insurance and customs clearance, is also devoid of merit because he failed to provide UNIDO with proper evidence of such expenditure.

D. In his rejoinder the complainant seeks to counter the pleas in the reply. He denies having reported that he was divorced: it was a personnel officer who put that information on the official form after he had signed it. Nor was there any change in his status while he was on UNIDO's staff: he was married throughout. It was "arbitrary" to require a marriage to be concluded before a representative of government authorities and inconsistent of UNIDO to put itself above national law yet demand documents issued by such authorities. There would have been no point in his submitting evidence of expenditure while he was challenging a decision that granted him "proportional, estimated costs". He seeks a further 3,320 schillings to cover the costs of his rejoinder.

E. In its surrejoinder the Organization disputes facts and challenges the reasoning in the rejoinder. In its submission the complainant has failed to provide any "clear" evidence to show when and where his "traditional" marriage took place. UNIDO's helping Miss Szabó to get a visa was a mere courtesy, not acceptance of her as his wife. None of his claims warrants any further payment.

CONSIDERATIONS

1. The complainant joined UNIDO on a one-year appointment, which ended prematurely in the circumstances set out in Judgment 1714 on his first complaint. He went to Sri Lanka and worked there from 13 January 1995. In this, his second, complaint he is seeking (a) recognition of his *de facto* marital status and of his entitlements to dependency allowances, costs of travel to and from Sri Lanka and other benefits in respect of a dependent spouse, and (b) the costs of his own travel, and of the transport of his personal effects, from Sri Lanka.

Dependent spouse

2. In a "personal history form" which he completed on 6 June 1994 he described his marital status as "divorced" and named his daughter as his only dependant. He says that on 14 October 1994 his "second marriage was solemnised as a traditional ceremony".

3. Thereafter he submitted two forms headed "Status report and request for payment of dependency benefits". Each form contains five boxes relating to marital status, marked "Single", "Married", "Widowed", "Divorced" and "Legally separated", and two boxes, marked "Yes" and "No", for information as to change of marital status since the previous "status report".

4. In the first status report, which he submitted on 19 December 1994, he had ticked the boxes marked "Divorced" and "No" had been ticked. He explains, however, that as the form did not provide the option of "*de facto* marriage" he did not tick any of the five boxes and he presumes

that it was a personnel officer who ticked "Divorced". In the section for information about his "Spouse" he wrote "common-law wife", gave her name, Miss Zsuzsanne Szabó, and her nationality, which is Austrian, and claimed dependency benefits for her. The personnel officer told him orally the same day that UNIDO would not recognise his marriage without a marriage certificate issued either by his own country, South Africa, or by his country of residence, Austria. Since neither country issues certification of *de facto* marriage, he informed his "backstopping officer" that he wished to withdraw his "candidacy" for assignment to Sri Lanka; but that officer, he says, "undertook to arrange and supervise personally the recognition of [his] wife's status". Notwithstanding the disagreement about his marital status he went to Sri Lanka, bearing the cost of her air ticket himself.

5. In the second status report, which he submitted on 19 June 1995, he ticked the boxes marked "Married" and "No".

6. UNIDO neither recognised that he was married nor paid him any of the allowances or benefits due for a dependent spouse. It was only on 25 August 1995, on the eve of his departure from Sri Lanka, that he made a written claim to payment of dependency benefits, medical insurance coverage and costs of travel for her. Though again asked to submit a marriage certificate, he did not do so.

7. On appeal the Joint Appeals Board held that Miss Szabó could not be recognised as an eligible dependant and that he was not entitled to any payments for her. By a letter of 21 August 1996 UNIDO informed him that the Director-General endorsed the Board's conclusions.

8. The Staff Rules and Regulations do not define a "spouse". They do define a "dependent spouse", but only by reference to annual occupational earnings.

9. The complainant argues that although a certificate can be furnished for a marriage concluded before a registrar appointed by the national authorities, it cannot for a "traditional" marriage; however, Austrian law recognises the concept of "*de facto* marriage" which gives rise to the status of "common-law spouse". He submits that the issue is not so much a matter of national law as whether the Director-General's powers and discretion allowed him to ignore the *de facto* situation: "Dependants are", he observes, "dependants because they are maintained by the staff member". His "common-law wife" had been living with him since October 1994, and she was a dependant whom he maintained.

10. In order to be a "dependent spouse" someone must be not only the dependant but also the "spouse" of the staff member. As a general rule, and in the absence of a definition of the term, the status of spouse will flow from a marriage publicly performed and certified by an official of the State where the ceremony has taken place, such marriage being then proved by the production of an official certificate. The Tribunal accepts, however, that there may be *de facto* situations, of which "traditional" marriages are examples, and which some States recognise as creating the status of "spouse". In each such case where there is no definition of "spouse" it will be up to the staff member to prove not only the existence of the relevant fact but also the precise provisions of local law which give it consequences and the exact nature of those consequences, and he must show that such law is applicable in the context of the organisation's staff regulations and rules.

11. The "traditional" marriage which the complainant contends altered his marital status is not supported by evidence. Not only did he fail to submit a marriage certificate but at no stage did he furnish any clarification at all as to the nature of that ceremony and the solemnities, let alone any proof that such a ceremony had taken place. Nor has he cited any provisions of Austrian law under which the union would be recognised as marriage.

12. In the circumstances the Director-General was not obliged to accept the complainant's unsupported assertion that he was married. His claims to the recognition of his marriage and to consequential payments, allowances and benefits fail.

Repatriation entitlements

13. Acting on the Joint Appeals Board's recommendations the Director-General decided that the effective date of termination of the complainant's appointment would be 11 September 1995, and allowed him his repatriation entitlements. He was paid 1,200 United States dollars, the estimated cost of a ticket for travel by air in business class from Colombo to Vienna, and 4,000 dollars, the estimated cost of packing his personal effects and shipping them to Vienna.

14. He claims (a) 33,150 Austrian schillings as the cost of the airline ticket, without deducting any concessions which the UNIDO may obtain, and (b) 3,456 dollars plus 20,730 schillings as the actual cost of packing, shipping, insuring, clearing and storing his personal effects.

15. He has furnished no proof that the cost of an airline ticket from Colombo to Vienna was more than 1,200 dollars and there is in any event no reason to ignore any concessions to which UNIDO was entitled.

16. In his appeal to the Joint Appeals Board he made no claim in respect of the storage of his personal effects in Vienna, the actual cost of which was 17,730 schillings. That claim is irreceivable because of his failure to exhaust his internal remedies. The sum of 4,000 dollars paid to him was enough to cover the actual cost of packing and shipping – 3,456 dollars – as well as the balance of 3,000 schillings claimed by him.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

Mella Carroll

MELLA CARROLL

MARK FERNANDO

JAMES K. HUGESSEN

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

EIGHTY-FOURTH SESSION

In re Geyer (No. 3) **Judgment 1716**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr. Philip Gerhard Geyer against the United Nations Industrial Development Organization (UNIDO) on 17 October 1996, UNIDO's reply of 27 January 1997, the complainant's rejoinder of 12 May and the Organization's surrejoinder of 4 September 1997;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant's career in UNIDO is summed up under A in Judgment 1714 on his first complaint. By a letter of 12 December 1995 he lodged an appeal with the secretary of the Joint Appeals Board against "all the administrative decisions made since August 1995". Those decisions included what he regarded as unlawful termination of his appointment on the grounds of abandonment of post. Among the forms of relief he sought were "appropriate and lawful" termination of his appointment; payment of salary and allowances, including arrears; and payment of various entitlements for himself, his "common-law wife" and his daughter. By a letter of 5 July 1996 to the Board he claimed payment of 100,000 United States dollars in moral damages and of not less than $43,000 for loss of income; public and individual apologies; and "rectification of fact" in two newspapers and in letters to his bank, to his credit-card company and to others.

In an undated report the Board recommended, among other things, reversing the decision to separate him for abandonment of post and instead terminating his appointment as at 11 September 1995 with payment of one month's salary in lieu of notice and of one week's pay "for each month of uncompleted service plus repatriation entitlements minus proportional adjustment of hardship allowance, assignment allowance and education grant". But the Board recommended dismissing his claims to awards of material and moral damages and to public and individual apologies: it found no evidence that UNIDO had caused him financial or moral injury or damaged his reputation.

In a letter of 21 August 1996, the officer in charge of the Project Personnel Service in the Division of Administration told him that the Director-General had decided to terminate his appointment as at 11 September 1995 and pay him various entitlements but no awards of material and moral damages. That is the decision he is impugning.

B. The complainant submits that UNIDO's treatment of him was improper and he pleads mistakes of fact and of law. He says that its appraisals of his work were "questionable" and it mistook "impressions" and "second-hand" information for facts.

The Organization, he contends, failed to warn him of dismissal and so denied him the opportunity of stating his case. He alleges breach of good faith and of the duty to respect his dignity. Such was UNIDO's "resentment" that it put him under "financial pressure": it stopped paying his salary and gave his bank manager information about his contractual status and whereabouts.

He dwells on the damage it caused to his good name, health and feelings and says that his family suffered too. An apology was the least that the Director-General owed him after wrongfully dismissing him for abandonment of post. He also sustained material injury in the frustration of "solid" expectations of further employment with the Organization.

He is seeking (1) the regrading of his post for the duration of his appointment at L.5, step IV, plus the payment of interest at the rate of 12 per cent a year on the sums due; (2) awards of $296,948 in material damages and $80,000 in moral damages; (3) "public rectification of fact regarding [his] conduct in and departure from the project in letters to all the proposing vendors, all shareholders of ITMIN [the Industrial Technology Market Information Network Ltd] and the UNDP [United Nations

Development Programme]"; (4) "individual rectification of fact regarding [his] whereabouts and status during the period 29 August 1995 to 12 January 1996" to be notified to his bank, credit-card company, shipping agents and anyone else to whom UNIDO may have given information about him; and (5) 8,850 Austrian schillings in costs.

C. In its reply UNIDO contends that the complaint is in part irreceivable and in any event devoid of merit. His first claim is a new one and is therefore irreceivable for failure to exhaust his internal remedies. It is also without merit: the letter of appointment he signed stipulated that his salary would be the equivalent of step VI in grade L.4.

His other claims are also devoid of merit. He has failed to adduce any evidence of moral injury greater than the minor misfortunes of everyday life. The only information UNIDO gave to one of his creditors was his address, and that does not warrant moral damages. It denies breach of his right to a hearing. It maintains that he was not fit to be an international expert. Lawful termination of appointment does not entitle an official to material damages. Besides, his letter of appointment said it carried no expectancy of renewal or conversion to another type of appointment. As to public and individual "rectification" of facts, the Organization observes that Article VIII of the Tribunal's Statute does not allow such relief. Nor is there any evidence that any difficulties he may have had with his bank, credit-card company and shipping agents were of UNIDO's making.

D. In his rejoinder the complainant disputes arguments in the reply and enlarges on his own pleas. He denies that his first claim is a new one inasmuch as his internal claim to $100,000 in moral damages encompassed it. To back up his claim to moral damages he lists some twenty "accusations" UNIDO has wrongfully made against him. As to material injury, he sees breach of the rules on notice in the decision to end his appointment retroactively several months before the scheduled date of expiry. He contends that rectification of misstatements is a proper form of relief. He alters his claim to material damages to have the amount reckoned on the basis of salary for an official with two dependants at step IV of L.5. He invites UNIDO to make various submissions in its surrejoinder and claims another 12,740 schillings in costs.

E. In its surrejoinder the Organization observes that an internal claim to moral damages may not serve as a basis for putting forward new and unrelated claims later. In its submission the termination of the complainant's appointment was lawful and caused him no actionable injury. Nor, it says, are there any factual statements to set right. Besides, international organisations may not be required to make apologies. It observes that the submissions he wants are not relevant to the case and that the Tribunal already has enough evidence to make up its mind.

CONSIDERATIONS

1. The complainant joined UNIDO under a one-year appointment, at grade L.4, step VI, on 13 January 1995, and was assigned to a UNIDO project in Sri Lanka. That appointment ended prematurely in the circumstances set out in Judgment 1714, on his first complaint. In this, his third complaint he asks (a) that his post be regraded to L.5, step IV, and he be paid arrears of salary accordingly, and (b) that he be granted relief for the termination of his appointment in the form of awards of 80,000 United States dollars in moral damages and 296,948 dollars in material damages and "public rectification of fact" within UNIDO and in Sri Lanka regarding his conduct as well as "individual rectification of fact" to be notified to his bank, his credit-card company and his shipping agents.

Regrading

2. The complainant submits that his post should have been graded at level L.5, step IV, but that UNIDO refused his claim through prejudice because it considered him "too young".

3. UNIDO contends that the claim is irreceivable because it is made for the first time before the Tribunal. In reply the complainant says that the second appeal which he submitted to the Joint Appeals Board on 5 July 1996 set out claims which arose from new matters he had discovered in June 1996. One of those claims was to the payment of 100,000 dollars in moral damages. His contention is that the refusal to give the correct grade to his post fell within that claim because that refusal had resulted from prejudice and it was for prejudice that he claimed such compensation.

4. The appeal of 5 July 1996 made no mention of any refusal to grade his post correctly. That was not a new matter, and since that appeal referred to new matters the claim to moral damages can hardly be treated as covering it. Further, if the complainant was dissatisfied with the grading of his post Staff Rule 112.02 required him to seek review within sixty days of his

appointment. Having been made for the first time before the Tribunal, the claim is irreceivable for failure to exhaust the internal remedies.

5. As for the merits, the complainant said in a letter dated 15 December 1994 to the Administration that he understood that his grading on assignment to Sri Lanka would not affect his grading under any subsequent appointment and he accepted the post at the offered grade; however, he asked for a "higher net base salary", and he got it. Since he expressly accepted the grading of his post, his claim fails on the merits as well.

Other relief

6. The complainant claims 80,000 dollars in moral damages on account of injury to his professional reputation, good name, social standing and feelings, as well as to his physical and mental health.

7. As is recounted in Judgment 1714, when he left Sri Lanka on 29 August 1995, UNIDO treated him at first as having resigned and later as having abandoned his post. Finally, accepting the recommendations of the Joint Appeals Board, the Director-General treated him as having resigned and gave him his entitlements accordingly.

8. In dealing with his claim to moral damages the Tribunal must consider whether in the circumstances the termination had any effect on his reputation, feelings and health that was appreciably greater than the ups-and-downs of everyday life: see judgment 565 (*in re* Ali Khan No. 2).

9. One important consideration is that, although UNIDO erred in treating him as having abandoned his post on 29 August 1995, he had by then ceased to be able to discharge his duties under his contract for extraneous causes for which UNIDO was clearly not responsible.

10. He says that he was caused moral injury by unfounded allegations of corruption made against him by officers of the implementing agency of the project, Industrial Technology Market Information Network Ltd. (ITMIN), before he left Sri Lanka and that UNIDO did not respect his right of defence.

11. Yet at no stage did UNIDO associate itself with those allegations. On the contrary, the chief technical adviser of the project repudiated them and protested to ITMIN. UNIDO also requested the executing agency, the Sri Lankan Ministry of Industrial Development, not to make a formal request for the withdrawal of the complainant from the project as it was making attempts at conciliation between him and ITMIN. The Tribunal

holds that UNIDO was not responsible for any injury to his reputation and that it made efforts to minimise the effects of ITMIN's conduct. What set off the chain of events which ultimately brought his contract to an end was his memorandum of 20 June 1995 to ITMIN questioning its decision to award a contract and thereby overstepping his advisory role under the project.

12. The complainant contends that in late July and early August 1995 he suffered severe stress, difficulty in sleeping, collapse and injury to mental health.

13. While there is evidence that he spent two or three days in hospital, that is not sufficient to show either that he suffered problems of health beyond the ordinary or that, if he did so, any act of UNIDO was the cause.

14. The complainant further alleges that after he had left Sri Lanka unnamed officials of UNIDO had made statements to his credit-card company, to his bank in Vienna and to his shipping agent that he had abandoned his post leaving no trace of his whereabouts, and those statements had a devastating effect on his good name and creditworthiness. In his submission UNIDO failed to respect his dignity and reputation.

15. The credit-card company wrote to UNIDO in January 1996 saying that he had left Austria and Sri Lanka without giving them any address and that his account remained unpaid. All that UNIDO did was to give his address. It refused the company's request that remuneration due from UNIDO to the complainant be remitted to it. That UNIDO was not to blame is clear from a letter which the company wrote to the complainant on 9 May 1997 apologising for the mistakes that its employees had made.

16. In June 1996 the complainant's bank manager said that he had made a telephone call to "the UNO" in mid-December 1995 and then been told that the complainant had left his place of work one-and-a-half months early, that his address was unknown and that he owed money. In April 1996 the complainant's shipping agent reported that when he had telephoned UNIDO he was told that the complainant had disappeared months before and nobody knew where he was. In neither case did the complainant ask for the name or position of the person who had allegedly made those statements. The Tribunal holds that there is no evidence to suggest that the statements had been made by responsible officers of UNIDO acting in the course of their employment.

17. The complainant has therefore failed to show that UNIDO caused him any moral injury.

18. Since his plea that he suffered moral injury fails, so do his consequential claims to apologies and to the publication of "rectifications of fact".

19. He says that he had expectations of receiving further similar contracts from UNIDO but that at a meeting on 20 June 1996 the officer in charge of the Project Personnel Service made it clear that the Organization would never consider employing him for another expert mission. He claims material damages for injury to his career and loss of future income, in a sum of 296,948 dollars, which he says he could have earned from missions over the next three years.

20. He states that no specific allegations were brought to his notice at the meeting of 20 June 1996 but only extremely vague accusations such as that he had "attitude problems" and was "reluctant to adapt". He says he was also allowed to see the chief technical adviser's statement that ITMIN had "accused [him] specifically of corruption and abuse of position".

21. To the Organization's reply is annexed the version given by the officer in charge of the Project Personnel Service of the meeting in question. He says:

> "This meeting was arranged on my initiative in order to provide Mr. Geyer with an opportunity to reply to various allegations made against him and contained in his file in connexion with his mission in Sri Lanka. I informed Mr. Geyer that, if he would not provide UNIDO a satisfactory explanation on various allegations, his candidature most probably would not be considered for future assignments with our technical co-operation programme ... I did not communicate any decision to exclude Mr. Geyer's candidature for consideration for future assignments and so far no decision has been taken. Mr. Geyer's name continues to appear in the UNIDO computerized roster of experts. ... as to Mr. Geyer's conduct in the field, UNIDO received negative information on this matter from various sources, e.g. the [chief technical adviser], Mr. Geyer's counterparts, other experts in the project etc. [At the meeting] on 20 June 1996 I requested him to provide an explanation for his defence. However, Mr. Geyer considered various allegations as being too general and unworthy of comments. In fact some of those allegations are very concrete. *Inter alia* Mr. Geyer proposed and insisted on the purchase of over-dimensional and too costly computer hardware which was inappropriate for the needs of ITMIN. UNIDO Headquarters had to intervene in this matter and, when much cheaper computer hardware was selected, Mr. Geyer protested though his function should only have been advisory ... It is difficult to assume that Mr. Geyer acted in good faith or [that] this could be a technical error as he was fully qualified for such a job. No explanation was received from Mr. Geyer on this matter."

22. Since UNIDO had, as is explained in 11 above, rejected ITMIN's charges of corruption and misconduct, those charges should not have been raised with him again on 20 June 1996. Nor was UNIDO entitled to rely on such allegations in considering his suitability for future contracts.

DECISION

For the above reasons,

1. The Tribunal orders that UNIDO shall not rely on ITMIN's charges of corruption and misconduct in considering the complainant's suitability for future contracts.
2. The Organization shall pay him 500 United States dollars in costs.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

Mella Carroll

MELLA CARROLL

MARK FERNANDO

JAMES K. HUGESSEN

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FOURTH SESSION

***In re* Morelli (No. 2)**
(Applications by the complainant
and by the defendant)

Judgment 1717

THE ADMINISTRATIVE TRIBUNAL,

Considering the application filed by Mrs. Allegra Morelli on 4 June 1997 for the execution of Judgment 1614, the reply of 29 July from the International Fund for Agricultural Development (IFAD) and the letter of 20 August 1997 from Mrs. Morelli's counsel to the Registrar of the Tribunal saying that he did not wish to rejoin;

Considering the application filed by the Fund on 31 July 1997 for the interpretation of the same judgment and the letter of 20 August 1997 from Mrs. Morelli's counsel telling the Registrar that he would not be replying;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

CONSIDERATIONS

1. In Judgment 1614 of 30 January 1997 the Tribunal ruled on the complaint brought by Mrs. Morelli against the International Fund for Agricultural Development (IFAD) and ordered the Fund to pay the damages set under 13. The material passage reads:

> "She is entitled under this head not only to the amounts [the Fund] has already offered her by way of 'additional compensation' but also to an award of damages in the amount of six months' pay."

2. The parties disagree on the meaning of the word "pay". On 4 June 1997 the complainant filed an application for execution of the judgment and on 31 July the Fund applied for its interpretation. Since the purpose of both applications is to determine the construction to be put on that word, they may be joined to form the subject of a single ruling.

3. Interpretation depends both on the context and on the nature of the text. The word "pay" may mean one thing in a budget yet bear a broader or narrower sense in the context of tax law or pension entitlements. Judgment 1614 used the word to determine the amount of damages and ordered the Fund to pay her what she would have earned for six months' service. So "pay" means the amount she would have actually received had she been under contract for those six months, and it must include salary and any allowances payable to her of whatever kind – post adjustment, family allowance, and so forth. It does not, however, include the compulsory health insurance and other contributions that were routinely docked from her emoluments.

4. The conclusion to be drawn from that interpretation of the judgment is that the reckoning is wrong and the Fund must pay her the sums still due. It must also pay interest thereon at the rate of 8 per cent a year.

5. The complainant accuses the Fund of bad faith. But the evidence she offers in support does not bear out the charge. The plea fails.

DECISION

For the above reasons:

1. In executing Judgment 1614 the Fund shall observe the interpretation of the word "pay" in 3 above.
2. It shall pay the complainant interest at the rate of 8 per cent a year as from 1 May 1997 on the sums still due.
3. It shall pay her 5,000 French francs in costs.
4. Her other claims are dismissed.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

MICHEL GENTOT JULIO BARBERIS JEAN-FRANÇOIS EGLI

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-FOURTH SESSION

***In re* Palma** **Judgment 1718**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Francesco Palma against the European Southern Observatory (ESO) on 10 December 1996 and corrected on 13 January 1997, the ESO's reply of 17 April, the complainant's rejoinder of 30 July and the Observatory's surrejoinder of 20 August 1997;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The facts which prompted this complaint are set out under A in Judgment 1665, on Mr. Palma's complaint against the European Organization for Nuclear Research (CERN). Like other ESO staff, he is a participant in the Pension Fund of that Organization.

By two letters of 6 August 1996 the complainant asked the Director General of the ESO to confirm that decisions refusing him a post and medical coverage were final. The head of Personnel told him in a letter of 22 August that the insurance brokers, Van Breda, had agreed to continue his medical coverage as from 1 September 1995; since he was receiving from the CERN Pension Fund *ex gratia* benefits equivalent to 40 per cent of an "incapacity pension", he would have to pay only 60 per cent of the normal premium for the category of staff to which he had belonged while in the Observatory's employ. The complainant rejected that offer in a letter of 31 August 1996.

By a letter of 15 September he asked the Director General to answer his request of 6 August within sixty days. The head of Personnel repeated his offer on 20 September. On the same day the head of Administration replied on the Director General's behalf to the complainant's letter of 15 September and pointed out to him that the Director General had approved the Rehabilitation Board's recommendation for payment of an "unsuitability pension"; the CERN Pension Fund's decision of 7 May 1996 to grant him *ex gratia* benefits equal to "a partial incapacity pension of 40%" had been the outcome of an appeal he had lodged with the Fund and was not binding on the ESO.

By a letter of 9 October 1996 the complainant asked the Director General "to newly express" his decisions. He got no reply. In the complaint form he says that he is impugning the implied rejection of what he asked for in his letters of 6 August 1996.

B. The complainant submits that his disability, which he says CERN and the ESO have acknowledged, was due to an accident he suffered while working for the ESO and that he must be "assigned to duties corresponding to his physical capacities": that, he says, is what Article R II 1.27 of the Staff Regulations requires. In his submission, the Director General had no right to end his appointment before summoning the Rehabilitation Board and granting him an incapacity pension. The ESO got rid of him "inhumanely", leaving him with no health insurance and no job prospects.

He demands from the Director General express confirmation of the decisions refusing him rehabilitation so that he will have written evidence of the breach of his rights. Such written decisions would help him, if need be, in claiming national or international entitlements.

He asks that the Tribunal "compels" the Director General "to clearly and unambiguously state his *legally* presumed negative final decisions", particularly on assignment to a post and on health insurance. He seeks costs.

C. The Organisation replies that the complaint is irreceivable. For one thing, what the complainant wants is neither the "rescinding" of a decision nor the "performance" of an obligation — to quote Article VIII of the Tribunal's Statute — but a statement of decisions, apparently to afford grounds for some complaint yet to come. For another thing, even if his complaint were taken to be challenging the Organisation's implied refusals of a post and of full health insurance, it would be irreceivable for two reasons: it is out of time and some of his claims were dismissed in Judgment 1665.

The Organisation's pleas on the merits are subsidiary. It submits that it is under no duty to reappoint the complainant or to grant him health insurance. It did not dismiss him for invalidity: it was unaware of his ailments when it decided not to renew his appointment. Article R II 1.27 does require it to give someone with a disability duties corresponding to his physical capacities, but does not apply when the appointment has ended for other reasons. Nor may the complainant claim health insurance, having left the staff. After the CERN Pension Fund had granted him *ex gratia* benefits equal to a partial incapacity pension of 40 per cent it offered him retroactive health insurance with a proportional cut in premiums. Its offer still stands.

D. The complainant rejoins that his complaint is receivable: what he was objecting to was non-observance of provisions of the Staff Rules and Regulations, and he did so in time. In this complaint he is not claiming a post at the ESO or health insurance but is "creating the legal basis for possible ... complaints" to be put later to the Tribunal or to other bodies. The state of his health is, he says, "dramatic" and his incapacity, though assessed at 40 per cent, is in fact total since no one else will employ him.

He adduces items of evidence in rebuttal of the Organisation's contentions that he left the ESO on the expiry of his fixed-term appointment; that he did not appeal against the termination; that at the time the ESO did not know of his disability; that there were proper proceedings before the Rehabilitation Board; and that he appealed too late against the decisions on rehabilitation and on health insurance.

Lastly, he asks the Tribunal, should it find the factual evidence inadequate, to hear the Director General and ten other witnesses.

E. In its surrejoinder the Organisation points out that in Judgment 1665 the Tribunal held that the complainant had not appealed against the decision not to renew his appointment. Since his sole purpose is to reopen the case his complaint is irreceivable. The ESO rebuts his other pleas and presses its claims.

CONSIDERATIONS

1. The complainant is challenging the implied rejection of two requests which he made in two letters he wrote to the Director General on 6 August 1996. In one letter he asked the Director General to confirm that "ESO decision of not granting Mr. Francesco Palma any post and any re-assignment at ESO as handicapped is final". In the second letter he asked the Director General to confirm that "ESO decision of not granting Mr. Francesco Palma a health insurance coverage after handicapped at ESO, as one of the rehabilitation measures is final".

2. The relief he seeks is that the Tribunal "compels" the Director General "to clearly and unambiguously state his *legally* presumed negative final decisions in conformity to ESO Staff Rules and Regulations R II 1.25 up to R II 1.28 and RB 4.03 par. 11 and more specifically according to the Rule R II 1.27 concerning 'assignment' in a job at ESO and an ESO full Health Insurance coverage for the 'disabled' complainant".

3. Under Article VII(1) of the Tribunal's Statute "A complaint shall not be receivable unless the decision impugned is a final decision". The complainant has misunderstood the purpose of Article VII, paragraph 3, which is about the implied rejection of a claim. Its purpose is to allow a complainant who has got no decision on his claim to act as if a final decision had been taken. If no decision is forthcoming within sixty days of the notification of the claim to the Administration, the complainant may, within a further time limit of ninety days, bring a complaint against the implied rejection, which becomes the impugned decision. The receivability and merits of the claim can then be examined. There is no provision for applying to the Tribunal for an order to the Director General to state a negative final decision.

4. In reply to the second of the complainant's letters of 6 August 1996 the head of Personnel informed him by a letter of 22 August 1996 that, although he was not entitled to the continuance of health insurance coverage with the ESO, Van Breda, the insurance brokers, were willing to grant him retroactive continuance of coverage as from 1 September 1995; in view of the *ex gratia* grant of a 40 per cent pension he would be "exempted from the premium payment for 40%" and would have to pay "the normal premium for the category of staff" he belonged to "at a rate of 60%"; but coverage would not be valid for any period since 1 September 1995 in which he had benefited from other insurance schemes.

5. In a letter of 31 August 1996 to the head of Personnel the complainant turned down that offer and reiterated his demand for confirmation of the two negative decisions.

6. The head of Personnel wrote again on 20 September 1996 to remind him that his case had been submitted to the ESO's Rehabilitation Board and that the Director General had approved its recommendation for paying him an "unsuitability pension".

7. The head of Administration wrote to him on the same day making the same observations and saying that he had been granted the unsuitability pension as from 1 September 1995. He added that the subsequent decision of the Pension Fund of the European Organization for Nuclear Research (CERN) — in which he was a participant — to grant him *ex gratia* benefits equal to a partial incapacity pension of 40 per cent as from the same date was a decision taken on his appeal to that Fund and did not involve the Observatory.

8. The complainant has pressed his claim to relief which the Tribunal is not competent to grant.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

Mella Carroll

MELLA CARROLL

MARK FERNANDO

JAMES K. HUGESSEN

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

EIGHTY-FOURTH SESSION

***In re* Vollering (No. 12)** **Judgment 1719**

THE ADMINISTRATIVE TRIBUNAL,

Considering the twelfth complaint filed by Mr. Johannes Petrus Geertruda Vollering against the European Patent Organisation (EPO) on 4 October 1996, the EPO's reply of 20 December 1996, the complainant's rejoinder of 4 February 1997 and the Organisation's surrejoinder of 11 March 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Dutchman, is an examiner at grade A3 in the EPO's Directorate-General 1 (DG1) at The Hague. On 25 November 1993 he lodged an internal appeal, in English, against a decision on the output expected from him in 1992. On 14 March 1995 the Administration submitted a reply in French.

In a letter of 2 June 1995 the complainant asked the President of the European Patent Office, which is the EPO's secretariat, to "replace" that brief with one in English and to have the Administration reply in future in the language he had chosen for his appeal. He also wanted the President to treat the request as an appeal in the event of rejection. By a letter of 21 June 1995 the Director of Staff Policy told him that the President had rejected his request and put the matter to the Appeals Committee. In its report of 11 June 1996 the Committee recommended rejection. By a letter of 8 July 1996, which he impugns, the Director of Staff Policy informed him that the President had endorsed the Committee's recommendation.

B. The complainant submits that the EPO was wrong to answer his appeal in French. Had it replied in all three official languages he would have had no cause of action. In the absence of any rules on the language of the appeal proceedings the Administration has a duty to answer in the language in which the staff member has cast his appeal. He alleges misuse of authority, breach of good faith and infringement of his right to be heard by limiting his right to know the reasons for a decision. He also charges the Administration with failing to abide by an unwritten "agreement" in which the Administration's representative for internal appeals said he would reply in English. He accuses the Appeals Committee of partiality.

He seeks the quashing of the impugned decision and payment of 10,000 guilders, including 5,000 to cover the costs of translation, for any failure of the Administration to answer future appeals in the language of his own choosing. He also claims a total of 25,000 guilders in moral damages and 10,000 in costs.

C. The EPO replies that the complaint is devoid of merit. It was under no duty in law to submit its brief in English. Nor has the complainant adduced evidence of any "agreement" on its part to do so. In its submission his allegations of injury are bogus: his knowledge of French was rated "very good" in his latest staff report and he had not protested at getting briefs in French before. His objections about the Appeals Committee turn on his wish to use Dutch, which is not an official language at the EPO.

The Organisation describes his claims as "exorbitant" and the complaint as an abuse of the right to appeal.

D. In his rejoinder the complainant enlarges on his earlier pleas. He relies not on any written rule but on general principles and basic human rights. Since he had already stated a preference for English the Organisation's choice of French amounted to "discriminating or illegal treatment".

E. In its surrejoinder the EPO points out that the rejoinder contains no new substantive facts or arguments. It observes that since examiners are expected to have a "passive" knowledge of the three official languages, it is proper for all staff, including the author of the Administration's reply to the complainant's appeal, to use whichever one they prefer. The use of French being lawful, the Organisation neither impaired his rights nor discriminated against him.

CONSIDERATIONS

1. This complaint is based on the fact that the complainant's employer, the European Patent Organisation, in replying to an earlier internal appeal filed by him in English, one of its official languages, chose to write in French, another of its official languages.

2. The complainant cites no text which would oblige the Administration to reply in the same official language as the one originally chosen by him. He claims to have concluded an oral agreement with a representative of the Administration which would have obliged the latter to use the English language in dealing with his appeals, but is unable to produce any evidence to support the existence of such an agreement. He also contends, without citing any authority to this effect, that the use by the EPO of one of its other official languages in a written communication is discriminatory and a "misuse of power" and creates a situation of inequality.

3. In the Tribunal's view his complaint is trivial and without foundation. His mother tongue is Dutch. The official languages of the EPO are English, French and German. His post requires at least a "good" knowledge of all three of those languages. His staff report at the relevant time indicated a "very good" command of English and French and a "good" command of German. (In a rather transparent manoeuvre carried out after the fact he asked for and obtained a lowering of the assessment of his French language ability from "very good" to "good"; the Tribunal disregards this change). He has accepted a post in which he is required to assess the rights of others on the strength of applications written in any of the official languages of the EPO, whether his knowledge of the language chosen by the applicant be "good" or "very good": he is unquestionably capable of understanding and assessing the Administration's reply to his own internal appeal when it is written in French. Furthermore, to a number of earlier internal appeals he filed in English the Administration replied in French without prompting any objection from him.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

Mella Carroll

MELLA CARROLL

MARK FERNANDO

JAMES K. HUGESSEN

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FOURTH SESSION

***In re* Calvio, Dargemont, Gamberi and Pantopoulos**

Judgment 1720

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Miss Cinzia Calvio, Miss Catherine Dargemont, Miss Chiara Gamberi and Mr. Costas Pantopoulos against the European Molecular Biology Laboratory (EMBL) on 16 August 1996 and corrected on 28 August, the EMBL's reply of 28 November 1996, the complainant's rejoinder of 10 March 1997 and the Organisation's surrejoinder of 26 May 1997;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. On 8 September 1992 the EMBL applied to the Commission of the European Communities to take part in the Communities' project for research and development known as the Human Capital and Mobility Programme (HCMP). The purpose of it is to improve training for young research workers in countries of the European Union by awarding them fellowships. There are two kinds of fellows: "institutional" ones, who apply to some institution picked by the Commission to take part in the programme; and "individual" fellows, who apply to an institution of their own choosing. The Commission carries out and funds the Programme. It approves the list of applicants and makes over funds for the fellowships to the institutions, which then pay stipends to the fellows.

On 5 January 1993 the European Economic Community (EEC) and the Laboratory signed an agreement on arrangements for cooperation under the programme. The complainants, who were born in 1965 or 1966, are post-doctoral research workers. The Laboratory chose them to take part in the Programme as institutional fellows. They began work at dates ranging from 1 February to 1 September 1993. Their final contracts, signed from June until September, were for two years and described them as "visitors".

On 14 October 1993 the Laboratory issued a paper about the internal taxation of fellowships. It explained that institutional fellows participating in HCMP were paid at the rate applied by the EMBL and by the European Molecular Biology Organization (EMBO), which, like the Laboratory, is at Heidelberg, in Germany. The paper also explained that the difference between the EMBO/EMBL rate and the higher one in the Community was accounted for by the internal tax. On 16 November several fellows sent a petition to the Council of EMBL asking delegates to decide that fellowships should "continue" to be free of tax. The Council set up a working group, which stated in its report of 1 December that it was unable to determine whether the internal tax had a sound legal basis. It recommended that the Council endorse the "proposal" to levy the tax and apply it as from 1 October 1993.

At the Council's 20th Ordinary Session, held on 9 and 10 December 1993, the Director-General promised to apply as fair as possible a policy to fellows. In a memorandum of 11 April 1994 he informed group leaders that individual fellows would no longer be subject to internal tax and that previous deductions from their pay would be refunded. On 15 April the Commission asked the EMBL to alter the contracts of HCMP fellows so as to state the gross amount of the fellowship and details of any deductions. It pointed out that the only deductions allowed were those set out in the contract between the Laboratory and the Commission. In a memorandum of 21 February 1995 to institutional fellows the Head of Personnel explained the new method of reckoning their pay, which was still subject to internal tax. For most of them it meant higher pay. By a letter of 19 July the Director-General told them that their pay would continue to be reckoned in this way.

On 18 August 1995 the complainants lodged appeals with the Director-General pleading that they were being discriminated against and that there was no legal basis for the internal tax. By a letter of 16 October the Director-General dismissed their appeals as time-barred and gave them leave to go straight to the Tribunal. The complainants having declined his offer he told them by a letter of 6 November 1995 that he was willing to refer their case to the Joint Advisory Appeals Board. In its report of 21 March 1996 the Board held that the Laboratory was entitled to apply the internal tax to HCMP fellowships. It recommended that the Director-General put them on a par by either taxing or exempting both categories. By letters of 20 May 1996, the impugned decisions, the Director-General informed the complainants that he was rejecting their appeals.

B. The complainants submit that all HCMP research workers at the EMBL should be treated alike, whether they are "individual" or "institutional" fellows. They knew nothing of the internal tax until they read a note of 17 May 1993, and the EMBL has never given any reason for its discriminatory treatment of institutional fellows.

Citing the Staff Rules and Regulations, the Headquarters Agreement between the Federal Republic of Germany and the Laboratory and their own contracts, they submit that "visitors", being neither staff members nor paid out of the Laboratory's funds, should not be subject to the internal tax. Furthermore, the EMBL is in breach of its agreement with the EEC.

They seek repayment of all the amounts withheld in internal tax from the date at which each of them joined EMBL to 20 May 1996. They claim interest thereon at the rate of 8 per cent a year. They ask for a ruling that the EMBL must ensure that they are not subject to internal tax after that date. They seek a joint award of costs of at least 20,000 marks.

C. In its reply the EMBL submits that the complaints are irreceivable in part. The complainants may seek repayment only of the amounts withheld after 19 July 1995, when the Director-General decided to maintain the internal tax on institutional fellowships. But they are out of time in claiming reimbursement of the amounts deducted from the beginning of their fellowships until 19 July 1995: they knew from the outset that they were subject to internal tax and so should have appealed against their first pay slips within thirty days, the time limit in Article R 6 1.04. Their petition of 16 November 1993 is not an appeal within the meaning of R 6 1.01, particularly as they failed to sign it.

The Laboratory's pleas on the merits are subsidiary. Citing Annex R.D.1 to the Regulations, it contends that visitors are staff members and that under Article 4.2.01 of the Rules, fellowships are subject to internal tax. Furthermore, the tax is warranted by the principle of equal treatment for all research fellows working at the Laboratory.

When the EEC concluded the agreement with the Laboratory it did not object to fellows' being paid at the EMBO/EMBL rate; so it tacitly consented to the internal tax. The complainants derive no support from the provisions of the agreement between the Laboratory and the EEC.

D. In their rejoinder the complainants submit that they were unable to appeal in time because the Laboratory had not told them how much their stipends would come to. Citing the agreement between the EEC and the Laboratory, they observe that they are entitled to full payment of those stipends. By taxing them the Laboratory is guilty of unjust enrichment. They rebut all the other arguments submitted in the reply and press their pleas.

E. In its surrejoinder the EMBL maintains that the complaints are partly irreceivable. It submits on the merits that the rule against unjust enrichment has never before been applied in a context like this one. In any event the complainants are not direct beneficiaries of the funds made over to the Laboratory; so that rule is immaterial. The agreement between the Laboratory and the EEC conferred no rights on the complainants and so affords no basis in law for their claim to higher stipends than the figures given in their contracts.

CONSIDERATIONS

1. The policy of the European Union is to encourage training for young scientific research workers by funding fellowships under a project called the Human Capability and Mobility Programme (HCMP). Some of the fellowships are "individual", being granted directly to young people who have applied to a scientific institution. Others are "institutional" and are awarded in two phases: the European Union names institutions to which research workers may apply under the Programme; the chosen institution then puts applications to the European Commission and successful candidates are awarded fellowships. In 1993 the European Molecular Biology Laboratory (EMBL) signed an agreement with the European Economic Community for the acceptance of institutional fellows under the HCMP.

2. The complainants are young research workers who have been granted institutional fellowships with the Laboratory. They have signed

contracts with the EMBL on their pay and other conditions of employment. After deduction of an "internal tax" but before deduction of social security contributions monthly pay came to 3,689 Deutsche marks for three of them and to 3,837 for the fourth. The four complaints may be joined since they raise the same issue, namely whether the Laboratory may deduct the internal tax from institutional fellowships awarded under the HCMP.

3. The background to the legal issues is as follows. Under the Headquarters Agreement concluded on 10 December 1974 between the Federal Republic of Germany and the EMBL, the salaries and emoluments of EMBL staff are exempt from German income tax, but are "subject to a tax, for the benefit of the Laboratory, on salaries and emoluments paid by the Laboratory". Section 4.2 of the Staff Regulations sets out the method of reckoning and levying the tax.

4. On 17 May 1993 the Personnel Section of the Laboratory issued an information sheet stating that HCMP fellows were deemed to be staff members and so were subject to the internal tax. A note of 14 October 1993 explained that the purpose of that policy was to ensure that all fellows received the same stipend or at least to avoid disparities in pay between people who were at the same stage in their career and doing comparable work. The tax applied - said the note - to both institutional and individual fellowships; that was in line with the rules and would put institutional fellowships on a par with the regular fellowships paid by the Laboratory - at the so-called EMBO/EMBL rate - and bring individual fellowships to much the same level. A working group met on 18 August 1993. On 1 December 1993 it issued a report saying that it was unable to determine whether there was any basis in law for taxing HCMP fellows. It said, however, that it was aware that the Administration's policy was to ensure equal treatment and that the tax did close the gap between highly paid and other fellows. It concluded that the policy was sound, though it recommended that decisions should not be applied retroactively and that the fellows should be told beforehand just how they would be affected.

5. The decisions that followed upset the fellows, and some of them signed a petition asking, among other things, that their fellowships should continue to be tax-free. The Council of the Laboratory discussed the subject on 9 and 10 December 1993. It saw difficulties and discrepancies in having two rates for fellowships according to the source of funding and in applying the Laboratory's own "internal taxation" system. The Director-General then promised to work out a policy that would be "as legal and as fair as

possible". On 11 April 1994 a Laboratory memorandum went out saying that individual fellows were to be exempt from internal tax and the amounts wrongfully deducted would be refunded to them.

But institutional fellows were not exempt. Although in a memorandum of 21 February 1995 the EMBL put their stipend up to 4,490.74 marks a month, on the basis of the HCMP rate of 6,325.10 marks, it continued to levy the internal tax, set at 1,490 marks. In a letter of 19 July 1995 to the institutional fellows the Director-General explained his decision to keep the internal tax for them but exempt the individual fellows. The four complainants and one other institutional fellow appealed against the decision on 18 August 1995.

On 16 October 1995 the Director-General rejected their appeals and proposed waiving the internal procedure, which entailed referral to the Joint Advisory Appeals Board. But at their insistence he put the case to the Board. In its report of 21 March 1996 it held that the Laboratory, though entitled to tax them like staff members, should put institutional and individual fellows on a par. It saw two options: either taxing all of them, which would mean taxing individual fellows retroactively, or else taxing no one, which would mean paying back to the institutional fellows the sums levied from 1993 to 1996. It preferred the second option as being likelier to prevent any dispute, particularly with the European Commission.

But the Director-General did not agree. On 20 May 1996 he told the individual fellows that they were to be retroactively taxed and, to make for equality of treatment, asked them to consent to the Laboratory's levying the sums due on their pay. None of them did. By a decision of the same date he rejected the institutional fellows' appeals on the grounds that there was no question of letting them benefit from the mistake made in 1994 to the advantage of individual fellows: all fellows would thenceforth be paying the internal tax.

6. It is that final decision of 20 May 1996 that the complainants are now challenging. They contend that it is in breach of the rules on internal taxation and of the rule that requires equal treatment for everyone in like case. They seek the quashing of the decision and repayment of the amounts wrongfully deducted from their pay, plus interest.

7. The Laboratory replies that their complaints are irreceivable. They are barred from claiming repayment of the amounts levied in internal tax on

their monthly stipends because they failed to challenge in time their monthly pay slips.

8. The plea fails. A strong line of precedent has it that time limits, though necessary in law, are not supposed to set traps: they are to be applied with the good faith that must govern relations between an international organisation and its staff. True, only on 18 August 1995, and not when they got their first pay slips, did the complainants appeal against the policy decision of 19 July 1995. But the material issue had been identified, and moot, for a long time: were they subject to internal tax or were they not? The Joint Advisory Appeals Board observed too – and the Laboratory does not deny – that fellows were advised not to appeal "before the legal issues had been clarified". The conclusion is that the complainants' claims are beyond doubt receivable.

9. On the merits the main issue is whether the Laboratory may lawfully levy an internal tax on HCMP fellows whom it takes on as research workers. The complainants contend that it may not. They are, they say, not members of its staff, who are subject to the tax under the Headquarters Agreement and the organisation's rules. Besides, their pay is funded not by EMBL but by the European Commission. They are, they observe, "visitors", who are not on the Laboratory's payroll. It gets 12 per cent of the amount allocated to HCMP fellows against the costs of research and administration.

10. That view does carry some weight and indeed is probably the one most in keeping with the intent of the agreement between the European Economic Community and the Laboratory, as is plain from a letter of 11 September 1995 sent by Directorate General XII of the Commission. Yet the general conditions set by the Commission for the fellowships state that research workers still pay social security contributions and taxes out of their stipends and shall be told of their tax liabilities, which vary from one country to another. So the issue is whether, apart from and subject to the construction to be put on the Laboratory's agreements with the European Economic Community – which only the Court of Justice of the European Communities may determine – fellows were taxable under the rules applying to the Laboratory.

11. On the evidence the German inland revenue office at Heidelberg takes the view that the fellows' stipends are not subject to income tax but it does not say whether they may be subject to the internal tax. That is a matter to be settled in the light of the Headquarters Agreement concluded

between the Laboratory and the Federal Republic of Germany on 10 December 1974. Article 18 of that Agreement stipulates that "the staff members [in the other language versions 'les membres du personnel' and 'die Mitglieder des Personals'] shall be subject to a tax, for the benefit of the Laboratory, on salaries and emoluments paid by the Laboratory" and that "such salaries and emoluments shall be exempt from German income tax"; and Article 20 requires that "The Council shall decide the categories of staff members to whom the provisions of ... Article 18 shall apply".

12. Article 4.2.01 of the Laboratory's Staff Rules says that "Members of the personnel shall be subject to an effective system of internal taxation on their salaries and emoluments", and section 4.2 of the Staff Regulations confirms that rule by setting a scale of internal taxation. Annex R.D.1 to the Regulations divides "members of the personnel" into two categories: established staff members and non-established staff, who are called supernumeraries, or fellows, or visitors or non-graduate trainees, and are not ordinarily paid out of the Laboratory's own budget.

13. If all those provisions are read together the upshot is that HCMP fellows, whether treated as "fellows" or "visitors", are "members of the personnel". As such they are exempt from German income tax but subject to the internal tax. The Headquarters Agreement does use the simpler term "staff members" to denote what the Staff Regulations describe as "established members of the personnel, called staff members". But the intent of the Staff Regulations is plain enough: it is to bring within the ambit of the generic term "members of the personnel" anyone working at the Laboratory under an agreement signed with the Director-General.

14. The complainants were under contract with the EMBL. As was said in 2 above, they signed contracts that set their monthly pay and in three of the four cases stated that the amounts were "after deduction of internal tax". Although the funds are a subsidy from the European Commission, it is still the EMBL that pays the fellows and has contractual relations with them. So it was empowered under the Headquarters Agreement and its own rules to levy in the complainants' pay the internal tax that all "members of the personnel" must pay because of their exemption from income tax.

15. The complainants' plea of breach of equal treatment does have some relevance in view of the stand that the Laboratory adopted for some time towards the individual fellows but has now abandoned *de jure*, if not *de facto*. As the Joint Advisory Appeals Board said, the Laboratory might decide either to tax or not to tax individual fellows but it had to put

individual and institutional fellows on a par. But its former, mistaken, policy of bestowing a large tax benefit on individual fellows afforded no reason for bestowing it on institutional fellows as well. Since the internal tax is in keeping with the rules, the complainants' plea of breach of equal treatment is devoid of merit, as is the plea of "unjust enrichment" in their rejoinder.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

MICHEL GENTOT JULIO BARBERIS JEAN-FRANÇOIS EGLI

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-FOURTH SESSION

***In re* Morris (No. 3)** **Judgment 1721**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr. Robert Morris against the World Health Organization (WHO) on 19 November 1996 and corrected on 2 January 1997, the WHO's reply of 16 April, the complainant's rejoinder of 21 July and the Organization's surrejoinder of 24 October 1997;

Considering Articles II, paragraph 5, and VIII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Details of the complainant's career as a dental officer with the WHO and facts relevant to this case appear under A in Judgment 891 on his first complaint and Judgment 1323 on his second. Judgment 891 ordered the Organization to apply the "reduction-in-force" procedure provided for under Staff Rule 1050.2. The outcome was a decision of 22 December 1988 by the Director-General to pay him the terminal indemnity due under Rule 1050.4 and promise him "priority consideration for re-employment for any vacancies which may occur during the next twelve months in preference to any external candidates". During that period the WHO announced two vacancies for dental officers, one at grade P.4 and one at P.5, and he applied for them both. The process of selection having been delayed, the acting Director of Personnel told him that he would still be given priority until both posts were filled.

In a letter dated 27 February 1990 the acting Director of Personnel informed him that his application for the P.4 post had failed but that he still had priority for the P.5 one. The complainant's challenge to his failure to win the P.4 competition formed the subject of Judgment 1323, in which the Tribunal awarded him 30,000 United States dollars in material and moral damages.

This case is about his application for the other vacancy, which the WHO had announced in notice P89/93 of 16 June 1989. It was for a dental officer in the Organization's Regional Office for Africa (AFRO) at Brazzaville. In a letter of 24 June 1992 in answer to the complainant's request of 5 June for information the head of Manpower Resources told him that he had not been successful. On 11 September 1992 he gave the headquarters Board of Appeal notice of appeal. Having learned that he had first to put the matter to the regional Board of Appeal, he did so by a letter of 23 December 1992. In an undated report the regional Board recommended rejection. By a letter of 13 August 1993 a personnel officer informed him of the Regional Director's decision to endorse the recommendation.

On 25 October 1993 he went to the headquarters Board, applying at the same time for a stay in proceedings pending the outcome of his second complaint. Judgment 1323 was delivered on 31 January 1994. The complainant informed the Board by a letter of 19 April 1994 that he wanted to resume his appeal. He also asked the Director of Personnel for documents pertaining to the selection procedure. Replying on 2 May 1994, the chief of the Administration and Staff Support Service said that the Organization's policy was not to release "selection documentation". But in a letter of 19 September 1994 he attributed a change in policy to Judgment 1372 (*in re* Kashmiri Lal Malhotra): the Administration would release such documents as the headquarters Board might ask for.

By a letter of 8 November 1994 the chairman of the headquarters Board told the complainant that the Board had decided to send his case – like others about "non-selection" – back to the regional Board. The regional Board's second report, dated 25 June 1995, again recommended rejection. The Regional Director rejected his appeal in a letter of 9 August. On 22 September 1995, two days after getting notice of the Regional Director's decision, he appealed to the headquarters Board. It too recommended rejection in a report dated 2 July 1996. In a letter to him of 12 August 1996 the Director-General endorsed the recommendation. That is the impugned decision.

B. The complainant submits that it was unlawful to reject his candidature. He had priority over external candidates under Manual paragraph II.9.370, which says that someone whose appointment is terminated by reduction in force and whose service has been satisfactory shall for twelve months after separation be considered for vacancies for which he is qualified "in preference to any external candidates". His performance was satisfactory; he still had priority when he applied for the post; and he met all the requirements in the notice. What is more, the successful candidate, Dr. Samuel Thorpe, was an external one, though he had worked as a short-term Professional from 6 November 1988 to 30 September 1989 and from 25 January until 31 July 1990. Following a recommendation of 23 July 1990 by the Selection Committee, Dr. Thorpe became a "regular" staff member on 1 August 1990. But that did not entitle the Organization to treat him as an internal candidate so as to evade the complainant's right of priority. Nor does Manual paragraph II.9.370 limit the grant of priority to posts at the same grade as the abolished post or the grade just below it. Lastly, the shortlist which headquarters submitted to the regional Selection Committee made no mention of the complainant's priority over external candidates.

He seeks retroactive appointment to the post announced in notice P89/93 and an award of moral damages. He claims costs.

C. In its reply the WHO contends that the complaint is devoid of merit. Since priority applies only to posts at the grade the official held when he left the Organization, or one grade lower, the complainant had no right of preference for appointment to the disputed post. In any event he failed to meet the stated requirements. Dr. Thorpe had worked in the Organization as a consultant and short-term Professional and was a staff member when the Selection Committee met. So he "may thus be considered, in many respects, to be an internal candidate". The Organization denies causing the complainant any moral injury.

D. In his rejoinder the complainant rebuts the arguments in the WHO's reply. Priority is, he says, a means of keeping qualified staff on in preference to external candidates, whatever the grade of the vacancy may be. He is not asking the Tribunal to compare the candidates on merit but merely to rule that he met the basic requirements for the post. That the Organization describes Dr. Thorpe as an internal candidate "in many respects" shows that it knew full well he was an external one, as he obviously had been at the time of its offer of a short-term appointment in

January 1990. In any event it was wrong to give an external candidate a short-term appointment in order to avoid giving another candidate priority. The complainant presses his claims and seeks compensation for loss of earnings since leaving the WHO in the amount of $157,520.

E. In its surrejoinder the Organization maintains that giving preference for posts of a higher grade to someone who has been unsuccessful in a reduction-in-force exercise would be unfair to internal candidates applying for promotion. Manual paragraph II.9.370 applies to staff, like the complainant, whose appointments have already been terminated under Rule 1050.2 and for whom retention is no longer at issue. The Organization was diligent in informing the Regional Director of the complainant's suitability and indeed he was one of five candidates on the shortlist submitted to the Selection Committee. He was simply less qualified for the post than the successful candidate. The complainant's claim to compensation for loss of earnings goes beyond the claim in his internal appeal.

CONSIDERATIONS

1. This complaint is a sequel to Judgment 891, by which the Tribunal ordered the WHO to apply to the complainant the reduction-in-force procedure prescribed in Staff Rule 1050.2. The reduction-in-force committee found only one post to which that procedure might be applied but concluded that he did not meet the requirements of that post. It recommended giving him preference in terms of Manual paragraph II.9.370, which provides:

> "Staff members whose appointments are terminated by reduction in force whose service has been satisfactory and who wish to be considered for vacancies during the twelve months after their separation, are considered for vacancies for which they are qualified in preference to any external candidates."

2. By a letter of 22 December 1988 the Director-General informed the complainant that he accepted the committee's recommendation. Two vacancy notices were issued within the next twelve months. The first was for a P.4 post at headquarters in Geneva. The second, issued on 16 June 1989, was for a P.5 post at Brazzaville, the closing date being 28 July 1989. The complainant applied for both posts.

3. There was an unexplained delay in making selections for the posts. However, by a letter of 1 December 1989 the Director of Personnel assured

the complainant that the period for which he was entitled to preference would be extended until a selection was made.

4. By a letter dated 27 February 1990 the acting Director of Personnel told the complainant that he had not been selected for the Geneva post, and that the selection for the Brazzaville post "is yet to be finalized" but that he would be informed as soon as a decision was reached.

5. The Tribunal ruled in Judgment 1323 of 31 January 1994 on his second complaint in which he had challenged the decision not to appoint him to the Geneva post. It held that his right to preference over any external candidate had not been respected, and it awarded him $30,000 in damages for material and moral injury.

6. In the meantime, on 23 July 1990, the Selection Committee had chosen another candidate for the Brazzaville post. Not only did the WHO fail to inform the complainant promptly, but it did so, by a letter of 24 June 1992, only after he had inquired about the outcome. That letter did not suggest that he was not qualified for the post but, on the contrary, informed him that his name would remain on the WHO's records for a period of two years for other "similar assignments".

7. The WHO did not disclose in its letter of 27 February 1990 that the candidate selected for the Brazzaville post had previously been given short-term appointments to perform the duties of that very post. The evidence shows that the first of them began on 6 November 1988 and it was apparently for three months; it was extended from 6 February 1989 to 30 June 1989; and, although no contractual document has been produced, the WHO says that it continued until 30 September 1989. The second appointment was for six months, from 25 January 1990; the contract provided for a possible five-month extension and, although again there is no document, the WHO says that the appointment continued until 24 December 1990. It also says that the second short-term contract was converted to a regular fixed-term appointment as from 1 August 1990.

8. The complainant appealed to the regional Board of Appeal, which concluded that his experience was insufficient for the post and recommended dismissing his appeal. He then appealed to the headquarters Board of Appeal. While that appeal was pending the Tribunal ruled in Judgment 1372 (*in re* Kashmiri Lal Malhotra) of 13 July 1994 that the Administration must make available to boards of appeal the full records of proceedings of selection committees. The headquarters Board accordingly returned the case

to the regional Board for reconsideration. In its second report that Board did not conclude that the complainant was unqualified for the post. It observed that the chief of Oral Health at headquarters considered the selected candidate to be qualified for the post and that he was a short-term Professional and therefore had not been an external candidate when the Selection Committee had met. Accordingly, the WHO had committed no breach of the complainant's right to priority.

9. On appeal the headquarters Board disagreed with the Organization's contention that the complainant was unqualified for the post. It did so "in the light of the evaluation made" by the chief of Oral Health that he was an "excellent candidate with WHO field experience" and "qualified for the post". But it held that, since the WHO considered short-term Professionals who were employed against vacant posts to be internal candidates, the complainant's right to preference had not been violated: both of them were internal candidates and the Selection Committee had considered the complainant to be less experienced; and that was a point which the headquarters Board was not competent to question. The Director-General accepted that conclusion and dismissed the appeal.

10. Several questions arise: was the complainant qualified for the post? If so, did his right to preference extend to a post of a grade higher than his former post? Was the selected candidate an internal one and, if he was such only because of the short-term appointments he had been given, was it in circumvention of the complainant's right to preference to give him those appointments?

The complainant's qualifications for the post

11. The WHO has not produced the report of the Selection Committee, and there is no evidence that that Committee found the complainant to lack the required qualifications and, if it did, why it came to that conclusion. In fact the WHO's letter of 24 June 1992 implied that he was qualified; and the chief of Oral Health considered both candidates to be qualified. Further, in its statement to the regional Board of Appeal the Administration said that the original evaluation report of 31 August 1989 from Geneva on the candidates had recommended the complainant and put him on the shortlist of five candidates. The Tribunal holds that the headquarters Board was right in disagreeing with the contention that he was not qualified.

Preference for a post of higher grade

12. The complainant contends that in granting the former staff member preference over external candidates "for vacancies for which [he is] qualified" Manual paragraph II.9.370 means all vacancies, including posts at a higher grade, not just posts at his own former grade. The WHO disputes that on the grounds that the provision must be read, not in isolation, but in the context of the rules about reduction in force because "it is an integral element of the reduction-in-force procedure as a whole". Staff Rule 1050.2.1 provides that in the competition for retention a staff member may compete only for posts at his own grade or one grade lower. That procedure was designed – says the Organization – to ensure that candidates had an equal opportunity of competing with others "for posts at a grade for which they have a demonstrated competence", and "it flies in the face of this procedure to give unsuccessful candidates priority consideration for promotion to posts at a grade above which they have shown they are competent". Manual paragraph II.9.370 must therefore – the WHO concludes – be subject to the same restriction as Rule 1050.2.1.

13. While agreeing that giving preference for re-employment after separation is part of the reduction-in-force procedure, the Tribunal sees a fundamental difference in the nature of the competitions before and after separation. The former is between staff members only and preference is based not just on qualifications but on greater suitability as well. But where competition after separation is between the former staff member and complete outsiders, preference is based on qualifications alone. In such a competition there is good reason for giving preference to the former staff member. As the Tribunal said in Judgment 133 (*in re* Hermann) under 4:

> "... it is consonant with the spirit of the rules and regulations that a staff member who has served the Organization in a fully satisfactory manner for a particularly long period, and who might reasonably have expected to finish his career in the same Organization, should be treated in a manner more appropriate to his situation. If he loses his post, he may claim to be appointed to any vacant post which he is capable of filling in a competent manner, whatever may be the qualifications of the other candidates. Not only does this interpretation of the relevant rules take account of the legitimate expectations of staff members, but it is not prejudicial to the Organization itself, which has every interest in employing staff members who have shown themselves deserving of confidence over a long period of employment."

The conclusion is that Manual paragraph II.9.370 grants a preference in respect of all vacancies and that the complainant was entitled to preference for the Brazzaville post even though it was graded P.5.

The effect of the short-term appointments given to the selected candidate

14. The WHO submits, citing Judgment 1383 (*in re* Río Rumbaitis), that the selected candidate was a staff member throughout the periods when he was holding short-term appointments. Thus – it says – he was a staff member at the time of the issue of the vacancy notice (16 June 1989) and at the closing date it set (28 July 1989) and when the Selection Committee met and issued its recommendation (23 July 1990); and accordingly he was not an external candidate within the meaning of paragraph II.9.370.

15. The complainant contends that, even if the selected candidate was not external, his own right to preference required the WHO to offer him the short-term appointments and that in any event giving the selected candidate those appointments was an impermissible manoeuvre to circumvent his right to preference.

16. There are several matters which have a bearing on that contention. The WHO failed to disclose to the complainant that after issuing the vacancy notice it had extended the short-term appointment it had given to one of the candidates and had later given him a second appointment. Even in its letter of 27 February 1990 it told the complainant nothing on that score. It thus denied him the opportunity of pressing his claims to the temporary appointments and thereby keeping alive his right to preference. Further, despite the undertaking in that letter to inform him as soon as a decision was reached, it inexplicably failed for nearly two years to tell him about the selection. Such secrecy creates a doubt as to why it granted those appointments.

17. The Tribunal must consider whether there was any objective need to appoint a short-term consultant and, if so, when that need actually arose. The WHO has given conflicting explanations for its decision. In its reply to the complaint it says:

> "Meanwhile the AFRO Post was established, and the selection process initiated, but the need to appoint urgently a person for a short-term assignment as a Dental Officer in order to perform the duties of the vacant AFRO Post arose."

Yet in its statement to the regional Board it said:

> Due to financial constraints it was recommended that the post be filled initially on a temporary basis. The Regional Director therefore approved the appointment of [the selected candidate] as a short-term staff for 6 months from January 1990."

Those statements confirm that a temporary appointment became necessary only in January 1990 but they are contradictory as to why it was necessary.

18. In its statement to the headquarters Board the Administration referred to the first appointment given to the selected candidate in November 1988 and went on to say that he had been "re-appointed in the same capacity from 25 January 1990". That suggests that there was a need for someone to perform the duties of the vacant post even before January 1990, and in that respect contradicts the WHO's reply.

19. The Tribunal notes that an extension of the first appointment was given after 30 June 1989 and up to 30 September 1989. That decision came after the issue of the vacancy notice and before the closing date, and the WHO has not explained why it became necessary.

20. If the Tribunal is to accept the passage in 17 above from the WHO's reply to the complaint, the resulting position is that the post was advertised in June 1989; there was no financial obstacle to the immediate grant of an appointment; and there was a need to have someone perform the duties of the post in January 1990. If so, there was no need to give the selected candidate an extension after 30 June 1989 and the selection process should have been expedited.

21. It may be that the preference given by Manual paragraph II.9.370 extends even to the holders of short-term appointments *inter se*, but in a case where the holder of a short-term appointment is chosen in preference to a candidate entitled to the reduction-in-force procedure, that offends against the purpose and the spirit of the provision. To give a short-term appointment to an outside candidate after the vacancy notice had been issued deprived the complainant of his right to preference. If that were permitted the preference granted by paragraph II.9.370 could always be negated.

22. Dealing with the analogous provision in Regulation 4.4, which gives staff members preference over outside candidates, the Tribunal observed in Judgment 1077 (*in re* Janice Barahona) under 11 that when an outsider is given a temporary appointment financed from funds earmarked for a post and is then appointed to that post in preference to an inside candidate:

> "... that sort of approach is bound, whether rightly or wrongly, to give inside candidates the impression of subterfuge ..."

23. The Tribunal holds that the grant to the selected candidate of two extensions in February 1989 and thereafter and of the second short-term appointment in January 1990 not only offended against the purpose and spirit of Manual paragraph II.9.370 but amounted to subterfuge calculated to circumvent it.

Relief

24. The complainant asks for retroactive appointment to the Brazzaville post. Because of the lapse of time, however, the Tribunal will not quash the appointment made. As for damages, it appears that he was employed from 1987 as a consultant by the Ministry of Health of Kuwait but suffered the loss of thirteen months' income - amounting to 78,000 United States dollars - on account of the state of war in that country. Judgment 1323 also awarded him $30,000 in damages. Taking those sums into account, the Tribunal decides in accordance with Article VIII of its Statute to award him damages, under all heads of injury, in the sum of US$60,000. It also awards him $5,000 in costs.

DECISION

For the above reasons,

1. The WHO shall pay the complainant damages under all heads of injury in the sum of 60,000 United States dollars.
2. It shall pay him $5,000 in costs.
3. All his other claims are dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

Mella Carroll

MELLA CARROLL

MARK FERNANDO

JAMES K. HUGESSEN

AB Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

EIGHTY-FOURTH SESSION

***In re* Prvulovic** **Judgment 1722**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Tomislav Prvulovic against the World Health Organization (WHO) on 12 September 1996 and corrected on 6 November, the WHO's reply of 13 February 1997, the complainant's rejoinder of 8 March and the Organization's surrejoinder of 9 June 1997;

Considering Articles II, paragraph 5, and VII, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who was born in Yugoslavia in 1936, joined the staff of the WHO in February 1989 under a fixed-term appointment as a medical officer at grade P.4. In May 1990 the Organization assigned him to Ghana. Having abolished his post there at the Government's request, it terminated his appointment under Staff Rule 1050.1 on 1 March 1992. On 28 November 1992 he returned under another fixed-term appointment for two years as a medical officer at grade P.5. He was assigned to Yangon, in Myanmar.

In a form extending his appointment until 30 November 1996 the Administration gave 62 as the age of his retirement. By a memorandum dated 13 December 1994 a personnel officer told him that, having "validated" previous service in the Organization with the United Nations Joint Staff Pension Fund as from 31 October 1989, he would have to retire at the age of 60, on 31 January 1996, under Staff Rule 1020.1. That rule reads:

> "Staff members shall retire on the last day of the month in which they reach the age of 60. However, staff members who have become participants in the United Nations Joint Staff Pension Fund on or after 1 January 1990 shall retire on the last day of the month in which they reach the age of 62."

In a letter of 23 June 1995 replying to a request that the complainant had made for review the Organization's Regional Director for South East Asia confirmed that he must retire at 60. He accordingly retired at 31 January 1996.

By a letter of 13 February 1996 he told the chairman of the regional Board of Appeal that he intended to appeal against "premature retirement". In a reply dated 20 February the chairman said it was not clear what administrative action he was objecting to and drew his attention to the time limit. In a letter of 12 April 1996 he asked the headquarters Board of Appeal to take up his case. The secretary of the Board replied on 30 April 1996 that he had to put the matter to the regional Board first and then get a decision from the Regional Director.

He is impugning the decision in the memorandum of 13 December 1994.

B. The complainant submits that the Administration was wrong to make him retire at 60. He has three main pleas. First, since the WHO brought him back in November 1992 under an entirely new contract he was entitled to retire at 62. Secondly, the impugned memorandum shows a mistake of fact: he never validated prior contributory service with the Fund. Lastly, he alleges "premeditated" victimisation by the Organization.

He claims compensation for the loss of 10 months' pay, from 31 January to 30 November 1996, and for another 14 months' pay, from 1 December 1996 to 31 January 1998.

C. The WHO observes that his complaint is irreceivable for failure to exhaust the available internal remedies. In any event a challenge to a decision taken one year and nine months before the date of filing is plainly time-barred under Article VII(2) of the Tribunal's Statute.

The Organization answers the complainant's pleas on the merits. Though he returned in November 1992 as a new staff member, that was irrelevant to the age set for retirement in the rules. The WHO acknowledges that, contrary to what it said in the impugned memorandum, he had not validated prior contributory service with the Fund. But what matters is the date at which he joined the Fund and the fact that before returning to the

WHO, as he did within one year of separation, he had not collected any benefits.

D. In his rejoinder the complainant enlarges on his earlier pleas and answers the arguments in the reply. He says he did his best to resist the impugned decision and maintains that the mistake of fact that tainted the impugned decision was fatal.

E. In its surrejoinder the WHO presses its pleas and comments on several points in the rejoinder. Though plainly irreceivable, his complaint is also devoid of merit because the Organization correctly applied the material rules.

CONSIDERATIONS

1. The complainant contests a decision of the World Health Organization (WHO) establishing his retirement date, and in consequence the end of his fixed-term appointment, as at the end of the month in which he reached his sixtieth birthday.

2. The Organization maintains that the decision in question is in accordance with the applicable Staff Regulations and that the complaint is irreceivable on two separate grounds. The Tribunal will first examine the alleged irreceivability and will deal with the merits only if the complaint is found to be receivable.

3. The first ground of irreceivability is based on Article VII(1) of the Tribunal's Statute:

> "A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations."

4. The complainant wrote to the regional Board of Appeal on 13 February 1996 in the following terms:

> "On the eve of the last day, that as a former WHO staff, I am eligible to submit my appeal on the subject. This is to officially request you to consider herewith that I am starting the appealing procedure with my strongest possible protest against WHO illegal and wrongful procedure in the entire process.
> I am ready to submit all necessary evidence/proofs that I was told/instructed/advised that my retirement will start in January 1998 since I have taken my contract with WHO on 27 November 1992.
> I have prepared myself, my family and our entire future on the above basis.

> Being 'outcasted' on a ruthless short notice and being given very unfair and ill treatment by WHO authorities, in spite of highest respects and excellent rapport I am enjoying with the [Ministry of Health] entire government, top leaders, colleagues and people of this country, I have suffered a lot, physically and psychologically (I have proofs of my deteriorated health).
>
> I would therefore request your prompt action and sympathetic consideration of my case."

5. The chairman of the Board of Appeal promptly responded to that document on 20 February 1996 as follows:

> "Please refer to your communication dated 13 February 1996, received by me on 16 February 1996.
>
> In this connection, it may be mentioned that the Regional Board of Appeal is entitled to deal with appeals from the Staff members within the meaning of Staff Rule 1230.1 which states that 'Subject to the provisions of Rule 1230.8, a staff member may appeal against any administrative action or decision affecting his appointment status on the grounds that the action or decision complained of resulted from one or more of the following factors'. Staff Rules 1230.1 and 1230.8 are extracted and attached herewith.
>
> It is not clear from your letter which administrative action you intend to appeal against, and furthermore, your appeal should be within the time limit stipulated in the above Rules.
>
> We understand that you were separated from the Organization as from 01 February 1996. Hence you cease to be a staff member within the meaning of the said Staff Rule and, in view of this fact, you may find alternative avenues to meet your requirements."

6. The complainant apparently took the somewhat obscure wording of the last paragraphs of this letter to be an invitation to him to launch a further appeal to the headquarters Board of Appeal. He did so by a detailed and comprehensive document dated 12 April 1996 in which he set out in full his complaint against the Organization and attached a large number of relevant documents.

7. By a letter dated 30 April 1996 the secretary of the headquarters Board replied as follows:

> "With reference to your letter dated 12 April 1996 addressed to the Headquarters Board of Appeal (HBA), please refer to Staff Rule 1230.8.4 which states that 'A staff member who was assigned to a region at the time of the action complained of shall address his appeal to the regional Board of Appeal of the region concerned'. The HBA is competent to hear appeals from staff members and retired staff members administered by regional offices only against decisions of Regional Directors subsequent to the recommendations of a regional Board of Appeal, which means that we cannot accept your appeal

> until it has been examined by the appropriate Regional Board and Regional Director has informed you of his decision.
>
> I note that you contacted the Regional Board of Appeal (RBA), SEARO on 13 February 1996. If you have not already done so, you should send a revised declaration of intention to appeal to the RBA/SEARO, including the information requested by Mr. J. Pospisilik, Chairman RBA/SEARO, in his response to you dated 20 February 1996. Your revised declaration should consist of a brief letter indicating your full name, grade and Unit at the time of the administrative action impugned. You should state concisely the nature of the administrative action concerned and give the date on which you were informed of the decision, as requested by Mr. Pospisilik. Your declaration of intention to appeal should also include the grounds of appeal under the subsection(s) given in Staff Rule 1230.1, and a statement to the effect that in your opinion, all existing administrative channels have been tried.
>
> I would like to draw your attention to Staff Rule 1230.8.3, which gives the time limits applicable to appeals. Please note that your declaration of intention to appeal should be despatched to the Regional Board, SEARO within sixty calendar days of receipt of notification of the administrative action you are appealing against."

8. In the Tribunal's view the letter of 30 April 1996 gives a clear and unambiguous indication to the complainant that his appeal should be addressed to the regional Board of Appeal as well as an indication of the proper manner in which to bring such an appeal. Instead of following this advice and seeking a waiver or extension of time within which to launch his internal appeal, the complainant waited for over four months and then filed the present complaint.

9. The complainant has not exhausted or attempted to exhaust the means of resisting the impugned decisions which were open to him under the applicable Staff Regulations.

10. The second ground of irreceivability is based on Article VII(2) of the Tribunal's Statute:

> "To be receivable, a complaint must also have been filed within ninety days after the complainant was notified of the decision impugned or, in the case of a decision affecting a class of officials, after the decision was published."

11. The complainant had been advised by a letter from the WHO dated 5 October 1994 that his fixed-term appointment was to be extended by two years to 30 November 1996. Rightly or wrongly this term was based on the view that the complainant's normal retirement age was 62. The Administration revised this view in a letter dated 13 December 1994 and advised the complainant as follows:

> "Please refer to our letter dated 5 October 1994 indicating the extension of your appointment until 30 November 1996.
>
> It has recently come to our attention, however, that you have validated your prior service with the Organization from 31 October 1989, although your recorded entry on duty date is 28 November 1992.
>
> Staff Rule 1020.1 provides that staff members who have become participants in the United Nations Joint Staff Pension Fund prior to 1 January 1990 shall retire on the last day of the month in which they reach the age of 60. As you became, by your validation, a participant in the Fund prior to this date, your normal age of retirement is thus 60 years and you are therefore scheduled to retire from the Organization on 31 January 1996. We have accordingly amended your contract to reflect this new expiry date and we are enclosing herewith a revised Personnel Action which incorporates this change.
>
> We apologize for any inconvenience this may have caused."

12. This is the decision which is clearly identified by its date in the complaint filed by the complainant with the Tribunal on 12 September 1996.

13. There can be no question that the complainant received the impugned decision on or shortly after the date it bears. He confirms this in his entry under point 3(a)(ii) of the complaint form, where he gives 13 December 1994 as the date when he had notice of the final decision. He subsequently engaged in correspondence with his superiors protesting against it. While not all that correspondence has been produced before the Tribunal it is clear from the complainant's own written pleadings that it concluded, in a manner unsatisfactory to him, by July 1995. The complainant in fact retired from the WHO on 31 January 1996.

14. The complaint is out of time.

DECISION

For the above reasons:

The complaint is dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

Mella Carroll

MELLA CARROLL

MARK FERNANDO

JAMES K. HUGESSEN

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
* GENEVA *

EIGHTY-FOURTH SESSION

***In re* Qureshi (No. 2)** **Judgment 1723**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Nazir Mohammad Qureshi against the Food and Agriculture Organization of the United Nations (FAO) on 2 November 1996 and corrected on 7 January 1997, the FAO's reply of 17 April, the complainant's rejoinder of 7 June and the Organization's surrejoinder of 28 August 1997;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case are set out under A in Judgment 1426, of 6 July 1995, which dismissed Mr. Qureshi's first complaint as irreceivable for failure to exhaust his internal remedies. While on duty in the car park of the FAO's headquarters in Rome at some date early in October 1990, he had a dispute with another official. Whether the date was the 8th or the 9th is not clear, but the parties concur that the incident occurred at 9 o'clock in the morning. The complainant sustained injury to two fingers, for which the FAO says he got treatment from its medical service before returning to duty.

On 10 October he telephoned the office from home to say that he was ill and to ask for help. The chief medical officer of the Organization went to see him, diagnosed a stroke, and had him sent to hospital. After several days in a public hospital he was moved to a private clinic. He was suffering from sleeplessness, aphasia and paralysis of the right arm and leg. Though treatment brought improvement he never became fit to go back to work.

In a letter of 7 September 1991 to the alternate secretary of the Advisory Committee on Compensation Claims he asked that his illness and disability be declared service-incurred. In a reply dated 19 November the alternate secretary told him that the Organization had rejected his claim because the medical service found that the incident in the car park could not have brought on the stroke. He sought review of the decision in a letter of 17 December 1991, and a medical board was duly convened. It was made up of the complainant's doctor, an independent doctor and the medical officer of the FAO. On 21 April 1992 the FAO granted him a disability pension and separated him from service.

In its report of 4 February 1993 the medical board said that the independent doctor and the FAO's medical officer found no evidence of a link between the stroke and the dispute; the complainant's doctor said that the lapse of time was not so long as to preclude treating the incident in the car park as a "concomitant cause", together with the complainant's chronic high blood-pressure. By a letter of 30 December 1993 the secretary of the Advisory Committee told him that the Director-General had rejected his claim on medical grounds and the secretary referred him to the rules on appeals in case he wanted to challenge the decision. In a letter of 19 March 1994 he applied to the Director-General for review. The Assistant Director-General in charge of Administration and Finance told him by a letter of 18 May 1994 that the Director-General was upholding the decision and that he was free to go to the Appeals Committee.

By a letter of 5 August 1994 he lodged an appeal with the Committee, which reported to the Director-General on 23 May 1996 and recommended rejection. By a letter of 7 October 1996, which he impugns, the Director-General endorsed the Committee's recommendation.

B. The complainant charges the Organization with gross breach of human rights. In his submission his illness was service-incurred and the medical service misused its authority in an effort to "torture" or even "assassinate" him. To back up its case, he says, it tampered with the records and blamed his illness on chronic high blood pressure, citing documents of which it failed to give him notice.

He wants the FAO to acknowledge that his illness was service-incurred and to pay for the costs of treatment. He also wants the authority of the medical service to be "curtailed".

C. The Organization replies that the complaint is devoid of merit. A dispute of the kind that the complainant had with another staff member cannot cause a stroke of the type he suffered, whether it came 36 hours or even – as the complainant would have it – 12 hours later. Nor does the occasional risk of such a row constitute a "special hazard" within the meaning of Manual section 342.213. There is no evidence of any mistake of fact or of law that the medical board committed in discounting the incident in the car park as a cause of the stroke. As for his charge of tampering with the records, the complainant has failed to discharge the burden of proof.

D. In his rejoinder the complainant recounts the facts as he sees them and invites the Tribunal to compensate him under whatever law it sees fit. Having "no knowledge" of international law, he prefers not to discuss it. He claims the equivalent of 500 million lire in United States dollars and payment of the expenses his family incurred in travelling from Kohat, in Pakistan, to join him in Rome.

E. In its surrejoinder the FAO observes that there is no new evidence or argument in the rejoinder. It presses its earlier pleas.

CONSIDERATIONS

1. The complainant claims compensation for an alleged work-related injury arising out of an incident reported in the documentation to have taken place at about 9 a.m. on 8 October 1990, but said by the complainant to have in fact occurred on the following day. The injury in question is a stroke suffered by the complainant at about 9 p.m. on 9 October. There is no question that the stroke was permanently disabling and the complainant has been on disability pension since 21 April 1992.

2. The complainant, a security guard, started working for the Food and Agriculture Organization of the United Nations (FAO) in May 1978 at its headquarters in Rome. On the date of the incident in question he was working at the Commissary garage when, at approximately 9 a.m., he had an altercation with an FAO staff member and suffered an injury to his hand. The injury was not disabling and he continued working until his shift ended at 3 p.m. that day.

3. The complainant's claim to compensation is dependent upon his establishing that the stroke suffered by him on 9 October 1990 was, in accordance with Staff Rule 302.641, "attributable to the performance of official duties". That, in turn, is to some extent dependent upon his contention that the incident in fact took place on 9 October rather than 8 October, but even more fundamentally on his establishing a causal relationship between the altercation, whenever it took place, and the stroke.

4. In January and February 1993 the complainant's claim to compensation was submitted to a medical board composed of three qualified physicians, one appointed by the complainant, one by the FAO and one independent arbitrator. That Board found itself unable to establish the date of the incident but, giving the benefit of the doubt to the complainant and assuming the date to be 9 October, found by a majority that it was "unable to find sufficient scientific evidence to link the incident at 9 am with the stroke at 9 pm". This finding was specifically predicated upon documents submitted by the FAO establishing that the complainant had suffered from high blood pressure for approximately 10 years. The dissenting member of the medical board, the complainant's appointee, acknowledged the precondition of high blood pressure but considered that the interval of twelve hours was "not sufficient to exclude the stressful event in the morning as a concomitant cause of the cerebral vascular episode".

5. The complainant launched an abortive appeal to this Tribunal which, in Judgment 1426 of 6 July 1995, dismissed it as irreceivable. The complainant then appealed to the Appeals Committee of the FAO, which in a report dated 23 May 1996 held that because of "the particular circumstances of the appellant" the appeal was receivable and should be judged on its merits; the Committee went on, however, to recommend that the appeal should be rejected. The Director-General accepted that recommendation in a letter of 7 October 1996, which has prompted the present complaint.

6. The complainant makes a number of extremely serious allegations against the FAO. He alleges that the original handwritten incident report, which is in the first person and dated 8 October 1990, has been falsified by the FAO; that the FAO stole his copy of the report while he was in hospital; and that the FAO arranged for his transfer from a public hospital to a private hospital with the intention of inflicting mental torture upon him. He even

goes so far as to assert that there was an attempt to assassinate him. Finally, he alleges that his medical records were falsified with respect to his high blood pressure.

7. The Tribunal, after carefully reviewing all the documents before it, has no hesitation in finding that there is not one shred of credible evidence to support any of his allegations. The date on the incident report, which appears to be in the complainant's own handwriting, is clearly and unambiguously shown as "8-10-90". There is no indication of any alteration. There are duplicate copies of the report on file. Since both copies appear identical as regards the date, any falsification would have required an extremely sophisticated exercise in forgery carried out on two documents so as to make them appear the same. Nothing supports the view that the transfer of the complainant from a public to a private hospital was carried out with any intent to harm him. Indeed, on the contrary, the transfer seems to have had as its only purpose his own comfort and well-being. Allegations of attempts to torture and assassinate him are the purest fabrication. The same is true of the allegation that the medical records showing his high blood pressure were altered.

8. If it were necessary to do so, the Tribunal would unhesitatingly find as a fact that the incident which lies at the very foundation of the complainant's claim, namely the altercation at the Commissary garage, took place on 8 October 1990 and not, as the complainant alleges, a day later.

9. It is not, however, necessary to make such a finding. The medical board, as indicated, proceeded on the assumption that, even if the incident had happened on 9 October 1990, there was not sufficient evidence to link it causally to the stroke. The Tribunal has not been persuaded that there was any defect in the procedure before the medical board or that its findings can otherwise be validly attacked. The Tribunal has no authority to substitute its own assessment of the cause of the complainant's injuries for those of the medical experts: see Judgments 620 (*in re* Loroch No. 2) under 4 and 1284 (*in re* Fahmy No. 2) under 6.

10. Finally, three matters that the complainant raises in his rejoinder need to be briefly mentioned and disposed of:

(a) The complainant now says that all his costs at the private hospital to which he was sent were paid by himself and have not been reimbursed. If this is so, and no proof has been offered, it is clear that the complainant was covered by the staff insurance plan and was entitled to claim reimbursement from such plan. If he did not do so, that is his responsibility.

(b) He raises as a new ground of appeal the fact that the Appeals Committee did not grant him a hearing. It was not required to do so and made a specific finding that his presence was not necessary. The Tribunal sees no reason to interfere with that finding.

(c) The complainant applies for hearings before the Tribunal. The Tribunal rejects his application.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Seydou Ba, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

MICHEL GENTOT

SEYDOU BA

JAMES K. HUGESSEN

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
* GENEVA *

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FOURTH SESSION

***In re* Alamgir** **Judgment 1724**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Mohiuddin Alamgir against the International Fund for Agricultural Development (IFAD) on 15 November 1996, IFAD's reply of 20 February 1997, the complainant's rejoinder of 10 April and the Fund's surrejoinder of 26 June 1997;

Considering Articles II, paragraph 5, and VIII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a citizen of the United States who was born in 1943, joined the Fund in January 1983 as an economist at grade P.5 in Rome. At the material time he held a permanent appointment at grade D.2 and had just taken charge of the Management Information Systems Division (MM).

On 2 March 1995 he sent the President of the Fund a memorandum about the "strong resistance" he said his division was facing in carrying out a project and about his problems in working with the Vice-President of the Fund and others.

On 6 March the President summoned him and asked him to resign, under threat of dismissal if he refused to do so. Though the complainant allegedly agreed to go, he did not sign the letter of resignation. He took leave on 7 March. On the 8th he reported for work. He fainted in his office early in the afternoon. Later that day two doctors from the Food and Agriculture Organization of the United Nations (FAO) gave him a check-up. So did his own doctor, who prescribed a spell off work and treatment for nervous strain.

Correspondence followed between him and the Fund. Then, on 5 June 1995, the Vice-President sent him another letter of resignation for him to sign and the text of a letter, bearing that date, from the President which he would be sent if he chose not to resign and which gave him notice of termination in the interests of the Fund under Article 3.10.4 of the Personnel Policies Manual. The President's letter gave him three months' notice under Article 3.11.1 of the Manual. It accused him of conduct unseemly in an international civil servant and a Fund director, of lack of proper judgment in dealings with other staff and of insubordination. He refused to resign. By a personnel action form dated 13 July the Director of the Division of Personnel told him that he was dismissed as at 13 September 1995.

By a letter of 22 July he asked the President to review that decision. He observed that there was no evidence to bear out the charges in the letter of 5 June and that he had been denied the safeguards of disciplinary process since the President's main charge was his conduct. In a letter of 21 August the President upheld his decision of 5 June, which he reaffirmed he had taken under Article 3.10.4 in the Fund's interests, not under 3.10.5 for disciplinary reasons. He cited the complainant's memorandum of 2 March 1995 as an illustration of his inability to get on with other staff.

On 14 September the complainant gave notice of appeal to the Joint Appeals Board against the letter of 21 August and on 6 November 1995 he filed a full brief. In its report of 13 September 1996 the Board held that though the dismissal was not arbitrary the Fund ought to have acted under Article 3.9 of the Manual, which was about disciplinary action. So it recommended granting him "additional compensation". By a letter of 24 September 1996, to which was appended the Board's report, the President informed him of the rejection of his appeal. That is the decision he is impugning.

B. The complainant pleads that the President drew plainly wrong conclusions from the evidence. The grounds for the decision of 21 August 1995 were, he says, his conduct, as purportedly illustrated by his memorandum of 2 March 1995. But that memorandum betrayed no spitefulness: all he wanted was the President's help in settling a disagreement. More broadly, his conduct posed no threat to the Fund's interests. When he saw the President on 6 March 1995 he spoke of the undue pressure he and others had for years been working under. Besides, if his conduct had been as the President made out he would never have reached such a senior rank.

The President committed a mistake of law by denying him the safeguards of due disciplinary process. One canon of administrative law that international tribunals have time and again affirmed is that no-one may be dismissed for misconduct unless there have been disciplinary proceedings. And that holds good even where there is a rule that empowers the executive head to dismiss in the organisation's interests. So the Fund may not rely on Article 3.10.4 of the Manual to shirk the obligation.

The Fund was guilty of an affront to his dignity by informing the Appeals Board of several gratuitous charges against him of sexual harassment. It caused him unnecessary and excessive injury by denying him disciplinary proceedings and by putting evidence to the Board without his knowledge.

He alleges grave material and moral injury.

He seeks the quashing of the decision of 24 September 1996, awards of material and moral damages and costs.

C. The Fund replies that the dismissal, which came just after he sent his memorandum of 2 March 1995, was the upshot of a whole chapter of incidents, which it recounts. For years the treatment he meted out to staff had been "brutally insulting": he had thoroughly upset them and made several so ill that they had begged for transfer. One of them had even resigned. He was insubordinate too. So the conclusions the President drew from the evidence were not wrong.

Article 3.10.4 will cover any sort of dismissal the President sees as being in the Fund's interests, whether the threat to them lies in the official's approach to work or conduct or something else. The complainant has not proved the general rule which he says requires disciplinary proceedings before any decision is taken on the grounds of an official's conduct. In any event it was the interests of the Fund as a "functioning organisation", not his conduct, that prompted the President's decision.

The Fund concedes that the Joint Appeals Board should have sent him copies of the further evidence it filed at the Board's bidding in the internal proceedings. It produces them and invites him to comment. But it submits that its omission is not a fatal flaw as the evidence consists mostly of reports on his performance that he must have known about already.

The Fund denies any affront to his dignity. It did not itself charge him with sexual harassment. There was only one such charge, and it came from a woman who had been one of his colleagues.

D. In his rejoinder the complainant contends that dismissal under 3.10.4 in the Fund's interests is distinct from dismissal under 3.10.5 for disciplinary reasons. Such a distinction was, he says, drawn in Judgment 93 (*in re* Saini). The President is wrong to believe that he is empowered to dismiss someone for misconduct in the Fund's interests. If he were, he would be free to do as he pleased and Article 3.10.5 would be meaningless. To plead the interests of the Fund as a "functioning organisation" is a mere contrivance to bring the impugned decision under 3.10.4. He presses his pleas.

E. In its surrejoinder the Fund argues that Judgment 93 acknowledges an organisation's right to dismiss someone for misconduct when exceptional circumstances so warrant and for the sake of its own interests. In its submission the evidence shows this case to be just such an exceptional one.

CONSIDERATIONS

1. The complainant joined the staff of the Fund on 29 January 1983 as a senior economist at grade P.5. At the material time he was in charge of Management Information Systems and held grade D.2.

2. On 2 March 1995 he sent the President of the Fund a memorandum on the development of two projects that accounted for most of the work in that division.

3. On 6 March the President called him in and ordered him to resign under pain of dismissal.

4. In a letter of 5 June the President told him that his conduct was unhelpful to the Fund; he had been offered but had rejected the opportunity of resigning; so the President had decided in the Fund's interests to terminate his appointment under Article 3.10.4 of the Personnel Policies Manual. The grounds for the decision were, the President said, "your failure to conduct yourself in a manner befitting your status as an international civil servant and as a Director in this Organisation, your persistent failure to exercise the good judgment expected of such a person in working with the other employees of this Organisation and your failure whilst carrying out your duties to adhere to instructions".

5. By a letter of 22 July 1995 the complainant appealed to the President, in accordance with Article 4.10.2(a) of the Manual and B.2(a) of the Administrative Instruction, to reverse the decision of 5 June, which he

said was unlawful and gravely injurious; he added that he would still consider a settlement.

6. In a letter of 21 August 1995 the President upheld the decision, which he said was in no way arbitrary.

7. The complainant put the matter to the Joint Appeals Board. In its report of 13 September 1996 the Board agreed that the decision was not arbitrary but held that the Fund had not properly followed the procedure for termination in Article 3.9 of the Manual. It recommended granting him "additional compensation ... at par with the separation packages being offered in the [United Nations] System of Organizations including IFAD".

8. On 24 September 1996 the President sent the complainant a copy of the Board's report and gave him final notice of dismissal. That is the decision he is impugning.

9. He seeks the quashing of the decision of 24 September 1996 and consequential relief, including awards of damages in such amounts as the Tribunal sees fit for material injury and for moral injury, in particular the affront to his dignity, the harm to his good name and the unnecessary mistreatment of him. He claims costs. He has four pleas:

(1) The President drew plainly wrong conclusions from the evidence.

(2) He committed a mistake of law by denying the complainant due process.

(3) The Fund was guilty of an affront to his dignity, harmed his good name and caused him unnecessary and excessive injury.

(4) The material and moral injury caused by the impugned decision were grave.

10. The issue that his first two pleas raise is whether, in the absence of disciplinary process, the President was empowered to end his appointment by the decision of 24 September 1996.

11. Article 3.10.4 of the Manual says that a decision to terminate the contract of employment of an official may be taken by the President, "and the President alone", in the interests of the Fund. So it does vest discretion in the President to end an appointment in the Fund's interests without resort to disciplinary process.

12. Yet the Fund is mistaken in supposing that the President has unfettered authority under that provision to cite the Fund's interests as grounds for dismissal. He must set out the facts fully enough to enable the

Tribunal to exercise its power of review and to determine objectively whether it is indeed the Fund's interests that are the reason for the dismissal. As was held in Judgments 1234 (*in re* Crockett) under 19 and 1496 (*in re* Güsten) under 9, although an organisation's "own interests are paramount ... it must still, for the sake of proper management and mutual confidence, treat its staff fairly".

13. The Tribunal is satisfied on the evidence that, even though the grounds for dismissal were the complainant's conduct and in the circumstances there might have been a threat to the Fund's interests, it was not proper to apply Article 3.10.4 of the Manual.

14. Since the grounds for dismissal were the complainant's conduct, the proper procedure was the disciplinary one prescribed in Article 3.10.5. As was said in Judgment 247 (*in re* Nemeth) under 12, "unsatisfactory conduct ... is naturally a subject for disciplinary action".

15. So, as the Appeals Board held, the President was wrong to terminate the appointment under 3.10.4 without following the disciplinary process provided for in 3.10.5.

16. By denying the complainant the safeguards of due disciplinary process in Article 3.9.2 of the Manual the President committed a mistake of law that was a fatal flaw in his decision of 24 September 1996.

17. Article VIII of the Tribunal's Statute says:

> "In cases falling under article II, the Tribunal, if satisfied that the complaint was well founded, shall order the rescinding of the decision impugned or the performance of the obligation relied upon. If such rescinding of a decision or execution of an obligation is not possible or advisable, the Tribunal shall award the complainant compensation for the injury caused to him."

In the circumstances of this case reinstatement would be inadvisable. In the exercise of its authority under Article VIII of the Statute the Tribunal orders instead that the Fund pay the complainant 200,000 United States dollars in damages for the injury sustained under all heads on account of the President's unlawful decision.

18. He is further entitled to costs, and the amount is set at 50,000 French francs.

DECISION

For the above reasons,

1. The Fund shall pay the complainant 200,000 United States dollars in damages for injury under all heads.
2. It shall pay him 50,000 French francs in costs.
3. His other claims are dismissed.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

MICHEL GENTOT JEAN-FRANÇOIS EGLI SEYDOU BA

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FOURTH SESSION

***In re* Yousif** **Judgment 1725**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Ahmed Yousif against the International Telecommunication Union (ITU) on 24 January 1997, the ITU's reply of 19 March, the complainant's rejoinder of 20 May and the Union's surrejoinder of 24 July 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Sudanese who was born in 1939, joined the staff of the ITU on 1 January 1980 under a fixed-term appointment. He was assigned as an engineer at grade P.4 to the Technical Cooperation Department of the General Secretariat at the Union's headquarters in Geneva. After a transfer within the Union he was seconded to the United Nations from 1 February 1986 to 1 February 1988. From 1 February 1993 he served as radio communications engineer in the Telecommunication Development Bureau (BDT) and was paid a special post allowance corresponding to grade P.5. On 1 December 1994 he was promoted to P.5. His contract was extended to 31 December 1999, the date at which he was to retire.

On 12 December 1995 Mrs. Nora Magistris, a secretary in the Bureau, sent the Secretary-General and the Director of the Bureau a memorandum complaining about a quarrel in Nairobi on 28 November 1995 between her and the complainant at an ITU seminar which the complainant was organising there.

On 9 February 1996 the Secretary-General forwarded to the complainant a copy of the memorandum from Mrs. Magistris and told him that, since the charges it made might warrant disciplinary action, he was invited, in accordance with Staff Rule 6.1.3, to comment by 16 February. The complainant replied in a memorandum of 12 February. On the 15th the Secretary-General referred the matter to the Joint Advisory Committee. In its report of 7 March the Committee held that the complainant:

> "had addressed insulting and threatening remarks to Mrs. Magistris and shown her physical violence and had, among other things, threatened her with dismissal, shouting at her in public and in front of many witnesses on the evening of 28 November 1995 in the lobby ... of the hotel in which were resident the participants in various seminars, including the BDT one that he was organising."

The Committee's majority recommendation was dismissal. It said, however, that if the Secretary-General decided against that the only other possible sanction would be downgrading from P.5 to P.4, and it recommended ensuring that the complainant never again went on mission for the ITU or represented it at meetings or took part in headquarters meetings attended by outsiders. By a letter of 12 March 1996 the Secretary-General told the complainant that he had decided to downgrade him from P.5, step 10, to P.4, step 10, as from 1 April. The same day he asked the Director of the Bureau to take the other action against the complainant which the Committee had recommended.

By a letter of 14 May the complainant submitted to the Secretary-General a request for review of that decision in accordance with Staff Rule 11.1.1.2 a). By a memorandum of 17 June the Secretary-General told him that he was confirming the downgrading and the other action. On 6 August the complainant filed an internal appeal against that decision with the Appeal Board. In its report of 29 October the Board recommended confirming the disciplinary and other action taken. By a memorandum of 7 November 1996 the Secretary-General informed the complainant that he was upholding his original decision. That is the decision now under challenge.

B. The complainant puts forward four pleas.

His first is that the Joint Advisory Committee and the Appeal Board endorsed Mrs. Magistris' story without heeding his own explanations or the statements of impartial witnesses. He says that he never threatened Mrs. Magistris. The quarrel went no further than "an exchange of strong words accompanied by a waving of arms and gestures on both sides". He cites a declaration which several participants in the Nairobi seminar signed on 30 November 1995 and which praised his talents for organisation and management. One reason why Mrs. Magistris made an issue of the incident was a fear of disciplinary action for her poor performance and insubordination. Citing Judgment 1384 (*in re* Wadie), the complainant contends that the ITU's allegations do not amount to a "set of precise and concurring presumptions" of his guilt.

His second plea is that there was no due process before the Joint Advisory Committee and the Appeal Board. The Committee made a mistake of law and betrayed prejudice against him by referring in its recommendation to misdemeanours he had allegedly committed over the years. The secretary of the Committee had, as chief of the Personnel and Social Protection Department, recommended his downgrading to the Secretary-General and should therefore have stepped down or been removed so as to ensure proper impartiality. The Committee did not heed the views of the Director of the Bureau, who was not in favour of any sanction. The Committee should have given him a hearing and taken oral evidence from witnesses. There were two flaws in the proceedings before the Appeal Board. One was that the Union refused to let him be represented at the Board's hearings on 24 October 1996 and thereby acted in breach of Staff Rule 11.1.1.4 b). The other was that the Board held hearings in his absence, and that was in breach of Rule 11.1.1.4 d).

The complainant's third plea is that his downgrading, aggravated as it was by the decision not to let him go on mission or attend ITU meetings, was not proportionate to what had happened on 28 November 1995. Nor did it correspond to any of the disciplinary sanctions provided for in Rule 10.1.1 a). He cites a letter of 6 April 1996 from the Sudanese Government saying that the punishment was out of proportion.

Fourthly, he observes that downgrading is not a disciplinary sanction provided for in the rules of the International Labour Office, though the International Labour Organization is the United Nations agency in charge of labour matters. Downgrading "is considered as a management tool for use only if the parties agree".

He seeks the quashing of the decision of 12 March 1996, full reinstatement at grade P.5 as from 1 April 1996, the payment of 100,000 United

States dollars for material and moral damages, an award of costs and the payment of interest at the rate of 6 per cent a year on the sums due. He also wants the Tribunal to have an ILO expert explain to it the ILO's policy on downgrading.

C. In its reply the Union says that it paid heed throughout to the various versions of the material facts. It does find a "set of precise and concurring presumptions" of the complainant's guilt: the detailed objections put forward by Mrs. Magistris, the reports by two members of the ITU staff who witnessed the incident and the complainant's involvement in earlier incidents that showed up what sort of man he was. The Union contends that the evidence he wants to adduce relates to the quality of his performance, which is not at issue. It was free to conclude from the statements by Mrs. Magistris and by her witnesses that the incident did not stop at "an exchange of strong words accompanied by a waving of arms and gestures".

The Union submits that it was only reasonable for the Advisory Committee to take account also of the unfavourable items in the complainant's personal file. There was no reason for the chief of the Personnel Department to withdraw from the Committee. According to Rule 8.2.1 he or his deputy is an *ex officio* member of the Committee as its secretary. Furthermore, there is no evidence to bear out the complainant's contention that it was the chief of Personnel who had proposed downgrading to the Secretary-General. Nor were the views of the Director of the Bureau determinant, since the final decision on disciplinary action lies with the Secretary-General.

The Union observes that the complainant had two opportunities of stating his views: first, on 12 February 1996, in answer to the Secretary-General's memorandum telling him that a charge had been brought against him; secondly, on 28 February, after the first meeting of the Advisory Committee. He did not apply for hearings on either occasion.

The Union rejects his contention that the sanction was out of proportion to the offence. The Administration's reply of 18 September 1996 to his internal appeal said that his strong language and violent gestures had infringed in several respects the standards of behaviour required of international civil servants and set out in Regulation 1.5. It also pointed out that the incident had marred the ITU's reputation because it had occurred abroad. The restrictions put on the complainant's duties were not disciplinary sanctions but intended to prevent any recurrence. The letter of 6 April 1996 from the Sudanese Government constituted inadmissible interference in the ITU's internal affairs.

The Union observes that since downgrading is a sanction provided for in the Staff Regulations it need not find authority for it in the ILO's rules. Besides, other international organisations apply such sanctions. It objects to the complainant's application for the hearing of an expert witness.

D. In his rejoinder the complainant argues that the material facts should be "substantiated beyond a reasonable doubt". In his view the ITU is merely making allegations when it says that the incident went beyond what he himself admitted. The restrictions on his functions do amount to sanctions and are attributable to prejudice against him. They were imposed in breach of due process. He is not challenging the Union's right to impose the sanction of downgrading.

E. In its surrejoinder the Union presses its earlier pleas.

CONSIDERATIONS

1. The complainant has been on the staff of the International Telecommunication Union since 1 January 1980. At the material time he was serving in its Telecommunication Development Bureau (BDT) at grade P.5. In November 1995 it sent him to a seminar in Nairobi. There he had a row with an assistant secretary, and she objected to his behaviour. The Administration started disciplinary proceedings against him and the Secretary-General referred his case under Staff Rule 10.4.1.1 c) to the Joint Advisory Committee, which met three times. The majority recommended dismissing him. But the Committee was unanimous that "if the Secretary-General in the exercise of his discretionary authority should take account of facts not available to the Committee which might not allow him to endorse its recommendation ... the only other form of disciplinary action possible should be ... downgrading (from P.5 to P.4)". And to save its good name and protect its staff while on missions the Union should – the Committee believed – see to it that the complainant did not himself go on any more missions or to any more meetings attended by outsiders. On 12 March 1996 the Secretary-General accordingly downgraded him from P.5 to P.4 and asked the Director of the Bureau to give effect to the Committee's recommendation against letting him go on missions or attend meetings.

2. He made a request for review but on 17 June 1996 the Secretary-General upheld the decision. He filed an appeal. In a report dated 29 October 1996 the Appeals Board recommended confirming the disciplinary and other action and "revising [his] post description as soon as possible or reassigning him". The Secretary-General accordingly rejected the appeal by a decision of 7 November 1996, which he impugns. His complaint is receivable.

3. He is seeking reinstatement at grade P.5 in his former duties and an award of 100,000 United States dollars in damages. He submits that the disciplinary action was unwarranted; that the proceedings before the Joint Advisory Committee and Appeals Board were flawed; that none of the charges against him was proven; and that the punishment was in any event neither fitting nor proportionate, being imposed not, as the International Labour Office's own rules require, in the organisation's interest but by way of disciplinary action.

4. On the last point he applies for the hearing of an expert from the ILO to explain to the Tribunal why that Organization treats downgrading, not as a form of disciplinary action, but as a "management tool" to be used only with the staff member's consent. The application is disallowed because such inquiry would serve no purpose and ITU Staff Rule 10.1.1 includes "demotion to a lower grade" among possible sanctions anyway.

5. The complainant objects to the Joint Advisory Committee's reporting without having let him or his counsel plead before it or the Director of the Bureau comment in writing. He further objects to its taking account of items in his personal file that were prior to the material facts and its showing bias, which he partly blames on the fact that the secretary of the Committee, who was prominent in handling his case, was also Chief of Personnel.

The Tribunal is satisfied on the evidence that there were no flaws in the Committee's proceedings. The Union told the complainant on 9 February 1996 about the allegations against him and invited him under Staff Rule 6.1.3 to answer by the 16th. On the 12th he did so in a memorandum with five appendices. The Committee met and then called on him on the 27th to account for other incidents in his career. He replied forthwith in writing. The proceedings were fully adversarial. There was nothing in the rules to require the Committee to grant the complainant a hearing, and he did not apply for one anyway. The Committee submitted its report on 7 March 1996 after seeing the written evidence he had put to it. It was in accordance with Rule 8.2.1 that the chief of Personnel served as its secretary, and his doing so raised no presumption of bias in its report, the less so since he had no right to vote. The Committee was right too, provided its proceedings were adversarial, to consider whether the incident in Nairobi was a singular instance or not. As the rules required, it did take evidence from the Director of the Bureau; there was nothing wrong with its doing so orally; and, as it said in its report, it took account of his views, even thought it did not endorse them.

6. The Appeal Board proceedings show no flaw either. The complainant objects to the denial of representation by his own counsel and to the holding of hearings in his absence in breach – he says – of Rule 11.1.1.4 d). The answer to the former objection is that the Board heard him on 24 October 1996. It is true that his counsel were unable to attend, having been warned of the date only a few days beforehand, but changing it as they asked proved impossible. On the other point the Board did hear the complainant and witnesses. So there was no breach of Rule 11.1.1.4 d). In any event the Board is not a court of law and does not have to act as one in all respects: see Judgment 1124 (*in re* el Ghabbach No. 2) under 9.

Lastly, the complainant seems to be arguing that the Board was wrong to shift the burden of proof from the Union to him. But he rests his argument on the statement in its report that "in his oral submissions the evidence he gave failed to bear out his version of the facts". That is just a comment that, being irrelevant to the burden of proof, shows no mistake of law.

7. All that need be said on the merits is that the facts are proven and they did warrant disciplinary action. On 28 November 1995 the complainant publicly insulted and threatened someone at work. The incident was a serious one, and not to be mitigated by praise of his skill at running seminars or by support from the Sudanese Government. His behaviour was inexcusable and amounted to misconduct. There is no evidence to bear out his contention that downgrading was a punishment out of proportion to the offence.

The Union's handling of the case was beyond reproach and shows no misuse of authority. It is a pity that a chart it put out on 1 February 1996 presumed his downgrading to P.4. But the unit that was to blame for the "mistake" made him an apology, and it did not affect the lawfulness of the downgrading anyway.

8. Since his claim to the quashing of the impugned decision fails, so does his claim to damages.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

MICHEL GENTOT JULIO BARBERIS JEAN-FRANÇOIS EGLI

A.B. GARDNER

EIGHTY-FOURTH SESSION

***In re* Mogensen** **Judgment 1726**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Ejvind Mogensen against the International Labour Organization (ILO) on 15 November 1996 and corrected on 10 January 1997, the ILO's reply of 21 April, the complainant's rejoinder of 28 May and the Organization's surrejoinder of 11 August 1997;

Considering Articles II, paragraph 1, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither of the parties has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Dane who was born in 1938, has been employed by the ILO since 1970, save from March 1975 to November 1976. He served as a technical cooperation expert in Papua New Guinea, Guyana, Trinidad and Tobago, Antigua, the Gambia and Thailand. Then, in June 1990, he took up a career appointment as regional adviser on cooperatives for Asia and the Pacific and was sent to Bangkok. In March 1993 he became a senior specialist in cooperative development and training on the ILO's East Asia Multidisciplinary Advisory Team (EASMAT), still in Bangkok.

On 31 March 1994 the Assistant Director-General responsible for ILO activities in Asia and the Pacific wrote a minute to the Director of the Personnel Department and the Director of the Bureau of Programming and Management (PROGRAM) at headquarters in Geneva. It said that the Regional Office and the "technical departments concerned" had agreed to a switch of posts between Bangkok and New Delhi. The switch meant that the complainant's post would go to New Delhi and one for a specialist in labour administration from New Delhi to Bangkok. On 3 May 1994 the chief of Regional Administrative Services told the complainant that he would therefore be transferred to New Delhi. In a fax letter of 4 May to the Director of Personnel the complainant explained why his transfer was technically unwise and unwelcome to himself and to his family; he also pressed an earlier request for transfer to headquarters instead. He developed his case in correspondence with the Assistant Director-General, the Deputy Regional Director and the Director of Personnel, offering to stay on in Bangkok pending transfer to Geneva or, failing that, his retirement in 1998. But the Administration said they had no suitable post to offer him at headquarters and by a letter of 24 October 1995 the Director of Personnel told him to go to New Delhi "as soon as possible".

By a memorandum of 3 November 1995 to the Director of Personnel he sought review under Article 13.1 of the Staff Regulations stating that he would not, whatever the outcome, be able to move before June 1996, the end of the school year. By a letter of 7 December 1995 the Director said that after reviewing his case the Director-General was willing to postpone the transfer of his post until then, but no later.

On 9 April 1996 he lodged a "complaint" under Article 13.2 of the Staff Regulations alleging unfair and unwarranted treatment. The Director of Personnel replied on 30 July 1996 that the Director-General was confirming his transfer to New Delhi. That is the decision he is challenging.

B. The complainant submits that his transfer was unlawful. He pleads procedural and substantive flaws. The Administration infringed circular 479, series 6, of 15 April 1992 on "Mobility of staff between field and headquarters", which requires the Administration to consult the official before transfer and take account of his family's interests. In keeping with the ILO's "mobility policy" it should have brought him back to headquarters and sent out a specialist in cooperatives. Though the transfer of his post to New Delhi was "technically wrong", the Administration made vague references to the "wishes" of "constituents" instead of offering justification on technical grounds. The move has taken its toll on his family, having harmed the health of his children, cost his wife her job and reduced his post adjustment allowance.

He asks the Tribunal to quash his assignment to New Delhi and order his immediate transfer to Geneva or any other duty station acceptable to him. He claims moral damages in proportion to the time he was "forced" to stay at New Delhi and an award of costs.

C. In its reply the ILO argues that his complaint is time-barred: to be receivable he should have filed it within ninety days of getting notice of the Director-General's final decision, which the postal receipt gives as 6 August 1996.

On the merits it observes that transfer is a matter of policy and unrelated to such subjective issues as the official's preferences. The Director-General having taken the decision in the Organization's interest, there are no grounds for interfering with what was a proper exercise of his discretion. Nor were there any flaws in the decision to assign the complainant to New Delhi. The complainant alleges no mistake of law, but merely failure to apply the guidelines in circulars, which are not binding. The Organization had no duty to consult the complainant about his assignment, although the correspondence it did have with him lasted almost two years. It denies treating him unfairly and is sorry that, despite its search for a suitable post at headquarters at a time when money was short, "distress and disappointment" proved unavoidable. He is not immune to transfer because of any financial loss due to his wife's giving up a job or to the payment at a lower rate of the post adjustment allowance, the purpose of which is to ensure equal purchasing power of pay at all duty stations. In any event the Organization took account of his own interests by postponing the transfer for over two years. As the Tribunal has held, staff may be expected to cope sometimes with uncomfortable working conditions. The Organization observes that the Tribunal may not order his assignment to any particular duty station and asks it to dismiss his claims as unfounded.

D. In his rejoinder the complainant contends that his complaint is receivable. He did not get the impugned decision until 19 August 1996, having reported for work in New Delhi on the 16th. He enlarges on his pleas on the merits and rebuts the arguments in the reply. Had the Organization consulted at the outset as few as three specialists on its staff it might have spared him the distress and disappointment it admits to causing. He wants the Tribunal to set aside the decision to transfer "the post and myself" to New Delhi.

E. In its surrejoinder the ILO withdraws its objection to receivability. On the merits it points out that the complainant's arguments are mere expressions of "personal sensitivity", not valid objections to the lawfulness of his assignment. In any event the Tribunal is competent neither to establish whether a discretionary decision is ill-advised or technically wrong nor to review the transfer of a particular post.

CONSIDERATIONS

Background

1. The complainant has been employed by the ILO since 1970. On 1 March 1993 he was appointed "senior cooperative development and training specialist" in the East Asia Multidisciplinary Advisory Team (EASMAT) at the ILO's Regional Office in Bangkok.

2. On 31 March 1994 the Assistant Director-General responsible for ILO activities in Asia and the Pacific sent a minute to the Director of the Personnel Department and to the Director of the Bureau of Programming and Management (PROGRAM). The minute stated as follows:

> "Subject: Interchanging COOP/BANGKOK and
> ADMIN/NEW DELHI posts
>
> This is to inform you that it has been agreed with the technical departments concerned and the Bangkok Regional Office regarding the above posts to be interchanged."

3. In fact nothing had been agreed with the technical departments or with the Regional Office.

4. After a series of correspondence, the Assistant Director-General explained what had happened in a memorandum of 21 April 1994 to the Director of the Enterprise and Cooperative Development Department (ENTREPRISE) at headquarters in Geneva. He states:

> "1. I refer to [the Director of Personnel's] minute of 13 April, which is in turn a reaction to your minute of 5 April. It would seem that the process of consultation has not been appropriate, which I sincerely regret.
>
> 2. I asked [the Deputy Regional Director] to undertake preliminary consultations during his briefing in Geneva in early January. He reported to me that he spoke to you on the issue and that you agreed that cooperative development would be difficult in the former planned economies covered by EASMAT whereas there was more potential in countries covered by [the South Asia Multidisciplinary Advisory Team]. At the same time, you saw the need for urgent labour administration assistance in Cambodia, Laos, Viet Nam, Mongolia and China. [The Deputy Regional Director] reported to me that you could support the idea of a switch. However, in the absence of a written proposal, perhaps you left the issue aside.

> 3. Subsequently, we consulted PROGRAM but did not undertake further consultation of the technical units concerned. [The Deputy Regional Director] and I crossed wires on this: he thought that I would have further consultations during the Governing Body session, in particular on the implications for Mr. Mogensen, whereas I thought that all necessary consultations had been carried out. This was the origin of my minute of 31 March, which was an attempt to push matters forward at the end of my mission to Geneva.
>
> 4. [The Deputy Regional Director] asks me to convey his regret that his conversation with you has led to a misunderstanding.
>
> 5. Returning to the merits of the proposed switch, I hope that it will not be necessary to reopen the question. I have consulted the Area Office and [Multidisciplinary Team] Directors concerned, and it is very clear that the proposal reflects the priorities of our constituents. I hope that you can therefore agree, which would permit an early competition for a labour administration specialist in EASMAT.
>
> 6. If you agree, I will consult Mr. Mogensen on the date of transfer."

5. In a memorandum also of 21 April 1994 to the Assistant Director-General, the Director of ENTREPRISE stated that he did exchange views on the subject with the Deputy Regional Director; he "did not, however, realize that this would have personnel consequences of the type now proposed". Nonetheless he supported the proposal and invited the Assistant Director-General to "go ahead with the arrangements".

6. When the complainant was informed on 3 May 1994 that his post would be transferred to New Delhi he immediately objected on technical and personal grounds.

7. The same day he telephoned the Director of ENTREPRISE, who told him that "his agreement to the switch was based on the assumption that I [the complainant] had been consulted or actually had proposed it". Apparently in June 1995, the Director sent a fax to the Assistant Director-General in which he stated that the complainant's post should remain in Bangkok. These assertions by the complainant have not been denied by the Organization.

8. The Deputy Regional Director also hedged on the decision. In his memorandum of 6 September 1994 to the Director of Personnel, he argued on behalf of the complainant. He concluded that "we would be pleased here at [the Regional Office] to explore any proposal that would result in Mr. Mogensen's continued presence in Bangkok, or his transfer to Geneva".

9. From May 1994 to September 1995, the complainant continually appealed to the Administration to find an alternative to transferring him to New Delhi. He proposed a number of solutions, and he and the

Administration explored a number of job possibilities in other cities. None of these possibilities worked out, and the Administration did not accept his other proposals.

10. On 17 September 1995, the Director of Personnel informed the complainant by e-mail message that he would have to move to New Delhi.

11. However, on 5 October 1995, the Assistant Director-General wrote to tell the Director of Personnel that for "humanitarian reasons" he supported "the temporary attachment of the Senior Cooperatives Specialist position to the East Asia Multidisciplinary Team".

12. Nevertheless, and despite further protests, the Director of Personnel wrote to the complainant on 24 October to say that he should "prepare to transfer to New Delhi as soon as possible".

13. On 3 November he formally requested review of the decision under Article 13.1 of the Staff Regulations. In her letter of 7 December 1995, the Director of Personnel informed him that, with the Assistant Director-General and the Director-General, she had "reviewed the whole matter". The Director-General's conclusion was that the transfer could be delayed until June 1996, after which the complainant would have to move to New Delhi or he would run "the risk of non-extension" of his contract.

14. On 9 April 1996 the complainant submitted a "complaint" under Article 13.2 of the Staff Regulations. On behalf of the Director-General, the Director of Personnel wrote to him on 30 July 1996 to say that it had been rejected.

15. The reasons given for rejection were that:

(i) there were sound technical reasons to transfer the post;

(ii) his personal considerations had been taken into account, as evidenced by the two-year delay between the decision and the actual transfer;

(iii) the financial consequences of the transfer had been taken into account because of the much lower cost of living in New Delhi.

16. The complainant appeals that decision to the Tribunal.

Receivability

17. The ILO has abandoned its argument that the complaint is time-barred. The complainant has abandoned his claim that "action be taken to effect my immediate transfer to Geneva". These were the only two issues regarding receivability, and therefore this complaint is receivable.

Was there a flaw in the process?

18. It is not for the Tribunal to review the substance of decisions on structural reform within an organisation. As it has stated many times, it will review such a discretionary decision only if it was taken in breach of a rule of procedure, or if there was a mistake of fact or of law, or if some essential fact was overlooked, or if there was abuse of authority, or if some clearly mistaken conclusion was drawn from the evidence.

19. In the matter at hand the evidence points to a breach of procedure in the broad sense of that word.

20. The Assistant Director-General's original decision, relayed in his minute of 31 March 1994, was clearly based on the mistaken belief that everyone concerned had been consulted and had agreed.

21. The subsequent review by the Assistant Director-General and the Director of ENTREPRISE in their memoranda of 21 April 1994 demonstrates that the decision originated in a conversation between that Director and the Deputy Regional Director.

22. It appears from the evidence that during this review neither the Assistant Director-General nor the Director realised that the complainant had still not been consulted, even though that was clearly the normal practice.

23. The ILO does not deny the complainant's assertion that the Director told him on 3 May 1994 that the Director's "agreement to the switch was based on the assumption that I had been consulted or actually had proposed it".

24. In addition, ILO circular 479, series 6, of 15 April 1992 states at paragraph 4:

> "Under Article 1.9 of the Staff Regulations, the Director-General has the authority to assign staff to jobs at headquarters or in the field in the interests of the Office. Without prejudice to this underlying authority, the officials concerned will be consulted on transfers between duty stations ..."

Judgment 1496 (*in re* Güsten) similarly states under 9 that "one requirement of the case law is that the staff member be given a hearing beforehand when the transfer may harm his dignity or private interests and is not a matter of urgency".

25. It is significant that all three people involved in the original decision later expressed reservations. In his memorandum of 6 September 1994, the Deputy Regional Director argued on the complainant's behalf.

The Director of ENTREPRISE sent the Assistant Director-General a fax stating that the complainant's post should remain in Bangkok. And the Assistant Director-General himself wrote to tell the Director of Personnel that he supported the "temporary attachment" of the complainant's position to the Bangkok unit.

26. Finally, the complainant's seniority, length of service (virtually all of it on difficult posts in developing countries), the fact that he had only recently been moved to Bangkok, and the wholly unnecessary and unjustifiable failure to consult him constitute in the Tribunal's view a serious affront to his dignity and a breach of the Organization's obligation of respect towards him as a member of its staff.

27. These facts are clearly a source of injury to his dignity and feelings of rejection.

28. However, his reactions to the various events were also based in some measure on his expectation that some time in his career he would be transferred to Geneva. Although he had sound reasons for this expectation based on ILO policy — see for example circular 479 under 14 — he did not have a legal right to demand such transfer and cannot recover any compensation for the failure to transfer him.

29. The evidence supports the conclusion that, had the complainant been consulted before the decision was made, and not merely afterwards, it is likely that the Assistant Director-General would not have made the same decision. This conclusion is reinforced by the fact that all three officials connected with the decision thought that the complainant had been consulted beforehand.

30. In this regard the Tribunal notes the natural inertia which attaches to any decision once it has been made. Even in the absence of bad faith — and there is indeed none here — the decision to move the complainant's post became irrevocable on 21 April 1994 and thereupon ceased to be an open question to be objectively assessed. Once it realised that the decision was based on the wrong premise that there had been prior consultation with the complainant and consideration of his position, the Organization should have abandoned it and started again properly. Its failure to do so in the particular circumstances of this case tainted the process beyond redemption.

Remedy

31. While it is clear that at this stage the remedy of overturning the decision to transfer the post is not appropriate and would not in fact be in the best interests of either party, the complainant has suffered moral injury due to the actions of the Administration. It is difficult but not impossible to separate the portion of such injury caused by the frustration of the complainant's expectation of a transfer to Geneva from the portion caused by the failure in the process of transferring his post from Bangkok to New Delhi. The Tribunal considers that such injury should be properly compensated by an award of damages of 10,000 United States dollars.

32. The complainant, having represented himself, has no entitlement to legal fees, but he should be compensated for his costs in an amount which the Tribunal estimates at 1,000 dollars.

DECISION

For the above reasons,

1. The Tribunal orders the ILO to pay to the complainant the sum of 10,000 United States dollars in damages.
2. It awards him 1,000 dollars in costs.
3. It dismisses all his other claims.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

MICHEL GENTOT

EGLI

JAMES K. HUGESSEN

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail *Tribunal administratif*	International Labour Organization *Administrative Tribunal*

EIGHTY-FOURTH SESSION

In re Curina — **Judgment 1727**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Brenda Curina against the World Health Organization (WHO) on 21 March 1997 and corrected on 3 April, the WHO's reply of 9 July, the complainant's rejoinder of 21 August and the Organization's surrejoinder of 24 October 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Italian who was born in 1944, joined the staff of the WHO in 1990 as a secretary at grade G.4 in the Health Systems Research and Development Unit. The Organization gave her a fixed-term appointment for 18 months, the first 12 being probationary. It twice extended the period of probation, by three months each time. On 18 June 1991 it issued vacancy notice LR/91/53 for a G.4 post of secretary in the Resources for Research Unit of what is known as the "Special Programme of Research, Development and Research Training in Human Reproduction". The complainant applied, was chosen and in October 1991 took up her new duties under probation until 30 June 1992. At that date the Organization confirmed her appointment and granted her a two-year extension. On 1 March 1994 it offered her another two years, until 30 June 1996.

By a memorandum of 28 March 1996 a senior personnel officer told her that her post would be abolished at 30 June 1996 owing to "financial constraints" and, failing another assignment, the Organization would be terminating her appointment under Staff Rule 1050.5. She appealed to the headquarters Board of Appeal on 24 May 1996. In its report of

12 November 1996 the Board recommended upholding the decision to abolish her post on financial grounds but seeking some other suitable post for her and, since "the procedure used could not be proven to be free of prejudice", granting her 25,000 Swiss francs by way of moral damages and an award of costs.

By a letter of 23 December 1996 the Director-General upheld the decision to abolish her post and said that the Organization would neither try to find another post for her nor award her damages or costs. That is the decision she is impugning.

B. The complainant submits that the abolition of her post was unlawful. There were no objective reasons for abolition. Money was not decisive: less than two months after abolishing her post the WHO announced a vacancy for another secretary within the Programme. Her supervisors had assured her that any secretary whose post was abolished would be employed under short-term contracts and that the Programme needed her. She adduces evidence to suggest that the WHO abolished her post merely to get rid of her and she pleads misuse of authority. On the Organization's own avowal in its submissions to the Board of Appeal, her record did not warrant termination for unsatisfactory performance. She asserts her right to application of the "reduction-in-force" procedure on the grounds that the notice about the vacancy of her post failed to say that it was "time-limited" or indeed what its duration was.

She asks the Tribunal to set aside the impugned decision and the earlier ones to abolish her post and terminate her appointment. She claims reinstatement as from 1 July 1996 and awards of moral damages and costs.

C. In its reply the WHO describes her account of the facts as "distorted" and seeks to refute her pleas. The decision to abolish her post was, it says, a proper exercise of discretion and prompted by the need to cut costs and meet priorities. Because her record was not as good as that of officials on other posts at the same grade and equivalent in "value", it was in the Organization's interests to abolish hers. In any event she had no right to renewal. Nor was she entitled to application of the reduction-in-force procedure, her post being one of limited duration.

D. In her rejoinder the complainant disputes the WHO's account of the facts and answers its pleas. She offers further evidence of personal prejudice and observes that the Organization has failed to adduce any objective reasons for abolition. It had a duty under the case law to apply the reduction-in-force procedure. Had she been on a time-limited post that came to an end at the scheduled date, it would have had no such duty. But the WHO did not announce any date at which her post was to go. She presses her claims.

E. In its surrejoinder the WHO maintains that the abolition of the complainant's post was necessary because of lower financial contributions to the Programme. The reasons for abolition were objective. As to the reduction-in-force procedure, she herself conceded in a memorandum of 5 February 1996 to the Director of the Programme that the procedure was "not applicable to posts funded by the Special Programme". Nor does Rule 1050.2 require the procedure when a post of limited duration is abolished before the date of expiry. Her plea of personal prejudice is unfounded.

CONSIDERATIONS

1. The complainant joined the WHO on 1 July 1990 as a secretary at grade G.4 in the Health Systems Research and Development Unit under an appointment for eighteen months. Her letter of appointment described the post as one of limited duration. Her one-year probationary period was twice extended, by three months at a time.

2. The WHO issued a notice of vacancy in June 1991 for a secretary at grade G.4 in the Resources for Research Unit of the Special Programme of Research, Development and Research Training in Human Reproduction. It did not describe the post as one of limited duration. The complainant applied, was successful and was transferred to that Unit on 1 October 1991. Her performance during her new probationary period was assessed as satisfactory, and she was given a fixed-term contract from 1 July 1992 to 30 June 1994. The documents pertaining to the transfer and the contract have not been produced, but it is admitted that they did not describe the post as one of limited duration.

3. In January 1994 the Organization offered the complainant a two-year extension up to 30 June 1996 and this time described the post as one of limited duration. She accepted the offer without demur. Her complaint is about the abolition of her post.

4. From about 1988 the Special Programme was co-sponsored by a number of international organisations. It was financed almost entirely out of extra-budgetary funds made available by governments and other donors. It

was out of those funds that all Programme posts but four were financed. The complainant accepts that her post, being "financed from non-regular budget funds", was a post of limited duration as defined in Manual paragraph II.9.260.1.

5. The WHO says that contributions to the Programme began to decline in 1993. Accordingly, it had to reduce staff from 74, in the 1992-93 biennium, to 70 in 1994-95; and it decided to make a further reduction to 60 in 1996-97. It decided to abolish four General Service category posts in the Programme, including one in the Unit in which the complainant was working. In that Unit there were three full-time and two half-time posts of secretary, all at the same grade, of equal value and importance to the Programme and involving secretarial functions that were interchangeable. All of them were occupied.

6. In January 1996 the responsible officer of the Unit had discussions with all the staff members involved and with the three Professional category staff members "closely associated with the issue". Having invited suggestions for criteria for reduction in staff, he decided that seniority and performance were "the most pertinent considerations". As to seniority only one of the five secretaries was junior to the complainant; and as to performance, while all the others had consistently good appraisals, the first two of the complainant's last three appraisals contained several criticisms, though the most recent one was good and showed improvement. The responsible officer nevertheless considered performance to be more important than seniority.

7. Consequently, by a memorandum dated 28 March 1996 the chief of Contract Administration and Information told the complainant that it had been decided to abolish her post at 30 June 1996, the date of expiry of her contract.

8. On appeal the headquarters Board of Appeal -

> "took note of the efforts made to base the decisions concerning abolition of posts within the Special Programme on what the Programme Managers considered to be objective criteria.
>
> Nevertheless, the Board considered that it was unsuitable for such decisions to be taken solely by persons so closely connected with the posts in question, a practice which it considered was clearly open to accusations of prejudice. In this particular instance, the Board considered that the Management of the Programme was not in a position to take a decision that could be considered fair by all concerned ...

> The Board noted that in adapting the principles of a Reduction-in-Force procedure to their specific situation, the management of the Special Programme had not taken the necessary steps to ensure that decision-makers had no connection with the posts involved. The Board considered the procedure which had been implemented was flawed, in that it could not be proven free of prejudice.
>
> The Board concluded that while the need to reduce the staffing level of the Special Programme had clearly been established, the procedure used to select the [complainant's] post for abolition could not be proven to be free of prejudice. It seemed that the criteria were applied to the incumbents instead of the posts."

The Board recommended, in the light of the financial situation, that the decision to abolish the complainant's post should not be reversed; that every effort should be made to find a suitable assignment for her within the Organization; that, since the procedure could not be shown to be free from prejudice, she should be paid 25,000 Swiss francs in moral damages and her costs.

9. The Director-General accepted only the first of those recommendations and rejected the appeal.

10. There are two grounds of complaint:

(a) There were no objective reasons for the abolition of the complainant's post, and the decision to abolish it was illegal; in any event, the abolition of post procedure was misused.

(b) The reduction-in-force procedure provided for by Staff Rule 1050 should have been applied either because the complainant's post was not one of limited duration or - even if it was - because the premature abolition of her post put her in the same position as the incumbent of a post of unlimited duration which was abolished.

The Tribunal will take up (b) first.

The reduction-in-force procedure

11. Staff Rule 1050.2 provides:

> "When a post of indefinite duration - or any post held by a staff member with a career-service appointment - comes to an end, a reduction in force shall (if the post was filled) take place, in accordance with procedures established by the Director-General ..."

Paragraph II.9.260 of the Manual reads:

> "Reduction-in-force provisions do not apply to posts of limited duration; incumbents of such posts are not affected by these provisions and cannot

> benefit from them. Posts of limited duration automatically lapse at the end of the period for which they were established unless an express decision is taken to continue them. This period is specified in the relevant authorized position lists or programme budget proposals and also in vacancy notices and post descriptions. Posts of limited duration include:
>
> 260.1 posts financed from non-regular budget funds located either at Headquarters or at a regional office; ..."

12. The complainant argues that although her post was "financed from non-regular budget funds" the notice of vacancy did not specify, as II.9.260.1 required, that it was of limited duration; had that been stated, she would, she says, have "seriously hesitated" to apply for it.

13. The WHO replies that when the complainant first applied for employment she stated in her letter of 3 May 1990 that "although interested in long-term posts, [she was] available to take any posts in the interim"; accordingly, she accepted the appointment that began on 1 July 1990, even though it was of limited duration. While that appointment was still in force she was transferred to a post under the Special Programme. Not only did that post fall within the definition of "limited duration" in Manual paragraph II.9.260.1, but such duration was expressly stated in the document granting the extension which was in force at the time of the impugned decision.

14. In those circumstances, whatever may have been the consequences of the WHO's failure in the notice of vacancy, in the transfer and in the subsequent contract to describe the post as limited in time, the complainant suffered no injury because when she accepted the extension of her contract she knew full well that the post was of limited duration and she made no protest.

15. The complainant submits that her post was not intended to end on 30 June 1996 and that upon its premature abolition she was in the same position as the incumbent of a post of indefinite duration which was abolished. She contends that reliance by the WHO on "the formal exception provided for in the Manual II.9.260" for not applying the reduction-in-force procedure was "in clear violation of the spirit of the rule" and that "the WHO's Rules and Regulations are out of date, and no longer reflect the actual situation of permanent and time-limited posts".

16. The Tribunal holds that there is good reason for drawing a distinction between the two categories of post and that, since the Staff Rules and the Manual do not require the WHO to apply the reduction-in-force procedure to posts of limited duration, the impugned decision is not vitiated by its omission to do so. The complainant's plea fails.

The abolition of the complainant's post

17. While not questioning the reduction in funding for the Special Programme the complainant doubts whether there were financial constraints. She alleges that within two months the Organization issued a notice of vacancy for a full-time secretary for the Programme; and that the responsible officer of the Resources for Research Unit had assured all the secretaries that the incumbent of the post to be abolished would remain temporarily in the Unit.

18. The WHO explains that the notice was for a secretary at grade G.5; that that was not a new post but one which had fallen vacant on the reassignment of the incumbent; and that it had different functions and was in another unit. Whatever assurances the responsible officer may have given, his task was – says the Organization – merely to recommend which post should be abolished.

19. The complainant also says that the management of the Special Programme had given assurances that no more than 15 per cent of the budget would be allocated for administration; so what was required was the abolition of an administrative post, not of a scientific one like hers. Further, immediately after the abolition of her post, another secretary was brought in to continue her work and that shows that her post was needed.

20. The WHO replies that posts for secretaries in the General Service category are not scientific ones; and that although her post had to be abolished her duties did not have to be abolished too: they could be assigned to other staff members. The WHO cites Judgment 139 (*in re* Chuinard).

21. The complainant argues that the abolition procedure was misused: instead of objectively determining which post to abolish the WHO first decided that she should be the one to go, either because her contract was the first to come up for renewal or on the strength of appraisals of her performance – and the earlier unfavourable ones "had not always been objective".

22. The WHO denies the first allegation. As for the second, it refers to written admissions by the complainant, in comments on her appraisal reports as well as in letters, to shortcomings in her performance; the appraisals were therefore justified. In the Organization's submission there was no misuse of the abolition procedure: it had to choose one of several posts for abolition; as the posts were identical, no distinction could be made

on the basis of functions or the needs of the Programme; accordingly, the selection was made on the basis of performance.

23. The Tribunal holds that there were objective reasons for the abolition of the post and that the procedure was not misused. The headquarters Board of Appeal was in error in presuming prejudice simply on the grounds that the absence of prejudice had not been proved.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

Mella Carroll

MELLA CARROLL

MARK FERNANDO

JAMES K. HUGESSEN

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail **International Labour Organization**
Tribunal administratif ***Administrative Tribunal***

EIGHTY-FOURTH SESSION

***In re* Swaroop** **Judgment 1728**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Narendre Swaroop against the World Health Organization (WHO) on 14 February 1997 and corrected on 28 February, the WHO's reply of 2 June, the complainant's rejoinder of 21 July and the Organization's surrejoinder of 10 October 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for ;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Indian citizen who was born in 1941, joined the staff of the WHO at headquarters in Geneva in 1966. At the material time he held a "career service appointment" and was a classifier at grade G.6 in the Registry Unit of the Division of Conference and General Services (CGS).

In a memorandum of 17 March 1995 the Director of the Personnel Division told him that, in line with a decision by the Executive Board, nine of the twelve posts for classifiers in his unit were to be abolished; but the reduction-in-force procedure set out in Staff Rule 1050 and paragraphs II.9.250 to 375 of the Manual would not go ahead until "every effort [had been] made to accommodate, as far as possible, the people concerned by arrangements satisfactory to all parties".

By a memorandum of 29 September the Director informed the complainant that his was one of the posts that would be abolished as from 1 January 1996. The Director of CGS told his staff in a memorandum of 23 October that to avoid terminating any appointments two dozen vacant full-time posts in the Division would be converted into four dozen half-time ones. The next day he offered the complainant a half-time appointment as an assistant at grade G.6 in the Records Management Services as from 1 February 1996. The complainant turned the offer down on 2 November 1995.

In answer to a memorandum from a personnel officer he applied for four vacant fixed-term posts. In a letter of 30 November the Director of Personnel told him that, in view of the Reduction-in-Force Committee's report, he could not be offered another post in his occupational group; but did he want to be considered for a different occupational group? On 4 December 1995 the complainant answered that he did, and he thereafter applied for six posts in other occupational groups. By a letter of 13 December the Director of Personnel told him that the Reduction-in-Force Committee had found that he was not – to quote paragraph II.9.360.1 of the Manual – "obviously well-suited" for the work of those groups and that the Director-General had therefore decided to end his appointment on 31 March 1996.

On 12 December 1995 the Organization published notices of vacancy for half-time posts. On 12 January 1996 the complainant applied for two of them which were at grade G.6. He asked that his applications be treated first "as a single application for one ... full-time post". A personnel officer told him in a letter of 2 February that he had been picked to fill one of the two posts as from 5 February. The complainant rejected the offer on 7 February. By a letter of 9 February the same officer told him that his application for the second post had been unsuccessful. He left the Organization on 31 May 1996.

He went to the headquarters Board of Appeal on 15 February 1996. In its report of 18 September 1996 the Board recommended that the Director-General dismiss his claim to the quashing of the decision of 13 December 1995 but go on trying to find him other work through the conversion of part-time posts to full-time posts in Registry, and award him costs not exceeding 2,000 Swiss francs.

In a letter of 20 November 1996 the Director-General rejected his appeal but granted him 300 francs in costs and told him that "it has exceptionally been agreed to allow staff members [of CGS] to hold two part-time WHO posts". That is the decision he is impugning.

B. The complainant submits that the reduction-in-force procedure did not comply with the Staff Regulations and Rules and the Manual. The Administration discriminated against English-speaking staff, failed to explain its decision to end his appointment and was in breach of its duty to make him a reasonable offer of reassignment.

By appointing two staff members from outside to half-time posts in CGS the Organization disregarded the notice of vacancy, which stated that staff members whose posts were being abolished would get priority.

The decision to convert full-time to half-time posts was an abuse of the reduction-in-force procedure. In view of his age, seniority and good service he would have stood a reasonable chance of keeping his job through the "competition for retention" the holding of which was, he says, an essential condition of service. The Organization therefore infringed his acquired rights. His post was not really abolished since it was converted into two half-time posts. The reduction-in-force procedure offended against *audi alteram partem* since he was not given his say before the Reduction-in-Force Committee.

The notice of termination was null and void because it was not signed by the Director-General and the internal appeal procedure showed several flaws. He asks the Tribunal to order the WHO to produce many documents which he lists and which he says it refused to submit to the headquarters Board of Appeal.

He seeks the quashing of the Director-General's final decision of 20 November 1996 and the decision of 13 December 1995 terminating his appointment; reinstatement as a "career service appointee"; a declaration by the Tribunal that the conversion of full-time posts to half-time posts was unlawful; the quashing of the reduction-in-force procedure and its consequences; the quashing of the competition held as a result of the three notices of vacancy published on 12 December 1995; an award of 7,500 Swiss francs in costs; an award of 50,000 francs in moral damages and such other relief as the Tribunal deems "necessary, just and equitable".

C. In its reply the WHO explains that in a reduction-in-force competition the main criterion is the staff member's performance, not length of service. The Reduction-in-Force Committee took due account of the complainant's qualifications and experience and considered his case impartially.

Although the deliberations of the Reduction-in-Force Committee are confidential, the Board of Appeal and the Tribunal have access to the records. The Organization substantiated all its decisions about him. According to the Manual the Reduction-in-Force Committee was under no obligation to hear candidates for "retention". In fact it interviewed none of them.

Citing the case law, the WHO asserts that it did take suitable steps to find him alternative employment. But precedent did not require it to assign him to a post for which he was not qualified, whatever the length of his service. It submits that the notice of termination did not need to bear the Director-General's signature.

The creation of half-time posts out of vacant full-time ones had no effect on the reduction-in-force procedure. At the material time the Manual did not allow staff members to hold two part-time posts simultaneously. The internal appeal procedure was not flawed.

D. In his rejoinder the complainant maintains that the reduction-in-force procedure was in breach of WHO rules and the principles of international civil service law.

He contends that he was given no "valid reason or adequate explanation" as to why other staff members were found to be better qualified; so he was not given the opportunity of exercising his right of defence. That is contrary to the case law and amounts to diminishing the rights of staff members who are "dismissed *en masse*" rather than one by one.

He submits that the Manual allowed the creation of new half-time posts and not the conversion of full-time to half-time posts. He maintains that that lessened his chances of success in the reduction-in-force competition.

In his submission the WHO could quite well have allowed him access to the documents he wanted without breach of confidentiality. However, since it refused, he asks the Tribunal to base its decision on his allegations alone. He contends that the Organization has continued to abuse his rights and dignity. He therefore alters his claims and asks for 100,000 Swiss francs in moral damages plus interest as from 31 May 1996.

E. In its surrejoinder the WHO submits that the decision to convert full-time into half-time posts was taken by the Director-General in the interests of both the Organization and its staff and in accordance with the Manual.

Had the complainant not declined the two offers of a half-time appointment, he might have benefited from the Director-General's exceptional decision to let staff hold two half-time posts.

His application for access to documents was addressed to the Tribunal. Since the Tribunal has ordered no disclosure the Organization has not failed to comply. Indeed it has provided some of the information of its own accord. The complainant may not make new claims in his rejoinder, and his claim to moral damages is irreceivable because he did not include it in his internal appeal.

CONSIDERATIONS

1. The complainant joined the WHO as a clerk in 1966. On 1 June 1968 it appointed him as a trainee classifier at grade G.3. Having completed his training period and received several promotions, he was awarded on 1 July 1985 a "career service appointment" at grade G.6. At the material time he was working in the Registry Unit of the Division of Conference and General Services (CGS) as a classifier. His duties included sorting correspondence, identifying important correspondence for coding, filing, and retrieving information for programmes.

2. Because of financial constraints the WHO decided in 1995 to abolish a total of 167 posts at headquarters with effect from 1 January 1996. Ninety of them were in CGS and they included nine out of the twelve posts for classifiers: the three to be retained were of indefinite duration, one at grade G.7, one at G.6, and one at G.5.

3. The decision to abolish the 167 posts was conveyed to CGS staff by the Director of the division on 17 July 1995. The Administration issued two circulars in that month explaining the procedure to be followed for the reduction in force. By a memorandum of 29 September 1995 the Director of the Personnel Division informed the complainant that his post would be abolished.

4. Before implementing the reduction-in-force procedure the WHO made efforts in accordance with paragraph II.9.265 of the Manual to reduce the number of terminations of appointment. First, it encouraged voluntary separation. Secondly, it gave staff the opportunity of applying for vacant fixed-term posts on the basis that those whose posts were being abolished would have priority. The complainant applied, but unsuccessfully, for four such posts. Thirdly, the Organization converted 24 vacant full-time CGS posts into 48 half-time ones as from 1 January 1996 and offered a half-time post to CGS staff members whose posts were being abolished, including the complainant. Twenty-six accepted, the complainant declined. None of the

24 vacant posts would have been open for competition in a reduction-in-force exercise because they were either vacant posts funded from extra-budgetary sources or posts – other than those being abolished – which had become vacant as a result of voluntary separation. Only occupied posts would have been open for competition in a reduction-in-force procedure.

5. As a result of those efforts there were by 15 November 1995 only 29 staff members in the General Service category who were to take part in the reduction-in-force competition. In that competition, says Manual paragraph II.9.340.3:

> "... suitability for retention is assessed essentially by reference to the staff members' respective performance, including suitability for the international civil service, as evidenced by their various appraisal reports and other records; only if this comparison is not decisive should the precise periods of service be taken into account."

The Reduction-in-Force Committee reviewed the candidacy of the complainant, who, along with four other colleagues in the Registry Unit, was competing for two full-time posts within the same occupational group. But it did not find him more "suitable for retention" than the others, and he was therefore not offered a post.

6. Manual paragraph II.9.360.1 provides:

> "... if the candidate has received no offer of another post, he or she may request the committee to allow him or her to compete for posts in a different occupational group: Such a request is only accepted if, having regard to qualifications and experience, the candidate is obviously well-suited for work corresponding to that group. He or she will be presumed to be well-suited if he or she has held a post in the different occupational group at the same grade as that of the abolished post or at not more than one grade lower for at least one year during the preceding fifteen years."

That did not, however, preclude the Reduction-in-Force Committee from considering, case by case, whether candidates were suited for different occupational groups.

7. The complainant applied unsuccessfully for posts in four occupational groups: the library, accounting, health records, and archives. The Reduction-in-Force Committee found that he was not obviously suited for work in any of them.

8. Since he had been unsuccessful in the competition for retention the complainant was informed by a letter dated 13 December 1995 and signed by the Director of Personnel that the Director-General had decided to

terminate his appointment at 31 March 1996. The Organization later postponed the termination to 31 May 1996.

9. Of the full-time posts in CGS that had been converted into half-time ones and offered to CGS staff a few remained unfilled. The Organization issued notices of vacancy in December 1995 for six half-time posts, stating that staff whose posts were being abolished would have priority. Of the six posts four were for assistants in Registry at grade G.6, and although the duties were identical two notices were issued because two - covered by notice LR/95/30 - were of limited duration while the other two covered by notice LR/95/31 - were not. The duties were also similar to those of classifiers. The complainant applied in answer to both notices and on 2 February 1996 he was selected for one of the posts covered by LR/95/31 - which he declined - but not for either of the posts covered by LR/95/30.

10. On appeal the headquarters Board of Appeal recommended rejecting his request for reversal of the notice of termination, but it expressed dissatisfaction with the efforts made to find a suitable reassignment for him:

> "At the time of writing their report, the Board noted that 3 persons were employed on a part-time (50%) basis in registry as Assistants (Registry), while the equivalent of one and a half part-time (50%) posts remained vacant."
>
> "... further vacancies had arisen in Registry after the Reduction-in-force procedure was formally concluded, thus affording another opportunity for a reasonable offer of reassignment in the form of a full-time post to be made to the Appellant."

The Board recommended that the Administration should continue its efforts to find alternative employment for the complainant and reimburse his "certifiable legal expenses" up to 2,000 Swiss francs.

11. In a letter of 20 November 1996 to the complainant the Director-General said that he accepted the first recommendation. In regard to the second, he told the complainant that, because of the particular situation of CGS, staff members would be allowed to hold two part-time posts. As for the third recommendation, he granted 300 francs in costs.

12. The complainant's contentions before the Tribunal may be conveniently considered under the following heads;

(a) the reduction-in-force procedure;

(b) the conversion of full-time into half-time posts; and

(c) the failure to make him an offer of reassignment.

(a) The reduction-in-force procedure

13. The complainant alleges that the reduction-in-force procedure shows bias because the WHO conducted it in strict secrecy; because it gave a "verbal warning" to one of the twelve classifiers that his post would not be abolished while the complainant and others were told only that nine out of the twelve existing posts would be abolished; because the one classifier who kept his position, although he had five years' less service than the complainant, was the husband of the administrative assistant to an Assistant Director-General; because it retained an unusually higher number of French-speaking staff; and because only 20 per cent of Registry staff stayed on as against 58 per cent in the General Service category at large.

14. All those are mere insinuations. There is, for example, no evidence of any "verbal warning" to one of the classifiers. It would have been of little benefit to that staff member anyway because even if his post had not been abolished he would not have been any better shielded from termination than the others. The Tribunal rejects the complainant's allegations under this head as speculative and unsubstantiated.

15. His next objection is that the records of the Reduction-in-Force Committee were not disclosed to him; that no valid reason or explanation was given for the decision not to retain him within or outside his occupational group; and that he was denied an opportunity of stating his case before termination. So, in his submission, a staff member threatened with termination through no fault of his own because of a reduction-in-force has fewer procedural safeguards than one who faces disciplinary proceedings on account of, say, wilful misconduct.

16. The functions of a Reduction-in-Force Committee are similar to those of selection committees which deal with appointments, promotions and the like. While it is true that the records of selection committees must be made available to appellate bodies, yet, insofar as they relate to staff other than the appellants themselves, they are confidential, and there is no general requirement of disclosure to such appellants. The same rule must apply to a Reduction-in-Force Committee, and the circumstances of this case warrant

no exception. Likewise, the Staff Rules and the Manual impose no duty on a Reduction-in-Force Committee or selection committee to give the staff member a detailed explanation for its conclusions. As for the right to be heard before termination, it must of course be respected where there is a proposal to terminate an appointment for disciplinary reasons or for unsatisfactory performance. A Reduction-in-Force Committee does not, however, make findings of that kind but performs very different functions. That is clear from Manual paragraph II.9.340.3, which requires assessment "essentially" on the basis of appraisal reports and other written records of performance and service. The Tribunal holds that there has been no denial of the complainant's rights to equal treatment and to a fair procedure.

17. He pleads flaws in the procedure. Citing Manual paragraph II.9.280, he observes that the Organization failed to identify him as a candidate for retention, thereby prejudicing his chances for retention in the competition. Citing Manual paragraphs II.9.530 to 550, he further submits that the notice conveying the Director-General's decision to terminate his appointment, signed by the Director of Personnel, was void because it was not initialled by the Director-General.

18. The Tribunal holds that Manual paragraph II.9.280 does not require that the incumbent of a post that is to be abolished be specifically described or designated as a "candidate for retention", but only that he be told of his "rights and obligations". And Manual paragraph II.9.530 requires that notification of termination be signed by someone "authorized to sign personnel actions [and] initialled by the supervisor who initiated the action". Since the notice of termination, duly signed by the Director of Personnel, conveyed the decision of the Director-General, it was unnecessary for the latter to authenticate it further with his own initials.

(b) The conversion of full-time into half-time posts

19. The complainant submits that the decision to convert 24 existing full-time posts in CGS, after abolition, into half-time ones was irregular and *ultra vires* and deprived him of his acquired right to secure one of the full-time posts through a reduction-in-force competition.

20. Manual paragraph III.3.160 provides that a post in a unit may be abolished and the funds used to establish a new one in the same unit. Paragraph II.18.30 says that a part-time post may be created in the same way as a full-time one. The Tribunal holds that the decision to create half-

time posts in order to reduce the hardship to staff members faced with termination was neither irregular nor *ultra vires*. In any event, as was said in 4 above, none of the 24 full-time posts would have been available for a reduction-in-force competition.

(c) *Failure to make the complainant an offer of reassignment*

21. The complainant contends that the WHO failed to take suitable steps to find him alternative employment and to make him a reasonable offer of reassignment before termination although such reassignment would have been "immediately possible". It thereby broke Staff Rule 1050.2.5, which reads:

> "a staff member's appointment shall not be terminated before he has been made a reasonable offer of reassignment if such offer is immediately possible."

22. In reply the WHO refers to the efforts to reassign the complainant which it made before, during and even after the reduction-in-force procedure. It points out that he himself acknowledges that it even interviewed him for a post for which he had not applied.

23. Yet the WHO has neither denied nor explained the observations which the Board of Appeal made about the availability of full and half-time posts and which are quoted in 10 above. It is quite clear that four half-time posts of Registry assistants remained unfilled in December 1995, and it is reasonable to infer that they were posts which had been created by converting two full-time ones for which the complainant must have been eligible. Further, he was found suitable for the half-time posts covered by notice LR/95/31, and the Organization offers no explanation as to why he was not considered suitable for the identical, but time-limited, half-time posts covered by notice LR/95/30. It may well be, as the WHO contends, that a staff member may not usually hold two half-time posts, but the impugned decision shows that the Director-General does have discretion to appoint a staff member to two such posts.

24. The conclusion is that the WHO was in a position to offer the complainant either a full-time post or two half-time posts but failed to do so, and that he is entitled to an award of material damages for its failure to make him a reasonable offer of reassignment. In determining the amount of the award the Tribunal notes that the complainant could without prejudice

to his claim have mitigated his loss by accepting a half-time post. It sets the amount at 25,000 Swiss francs.

25. Having so decided, it need not entertain the complainant's pleas of irregularities in the proceedings of the Board of Appeal. But he is entitled to an award of costs.

DECISION

For the above reasons,

1. The WHO shall pay the complainant 25,000 Swiss francs in material damages.
2. It shall pay him 5,000 francs in costs.
3. His other claims are dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

Mella Carroll

MELLA CARROLL

MARK FERNANDO

JAMES K. HUGESSEN

A.B.Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-FOURTH SESSION

In re Sardo Infirri **Judgment 1729**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Jennifer Sardo Infirri against the World Health Organization (WHO) on 10 April 1997, the WHO's reply of 18 July, the complainant's rejoinder of 26 August and the Organization's surrejoinder of 20 October 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. **The complainant, an Australian who was born in 1942, joined the staff of the WHO in March 1972 under a short-term appointment as a technical officer at grade P.2 in the Dental Health Unit. Six months later she got a fixed-term appointment for two years. In October 1975 the WHO promoted her to P.3. In September 1982 it upgraded her post and accordingly promoted her to P.4 with the title of scientist. On 1 November 1985 it assigned her at the same grade to post No. 1.2606, which it financed out of the regular budget. It gave her several extensions of appointment, the last of them, dated 24 November 1993, being to 31 December 1995.**

In a memorandum to the Director of Personnel dated 28 September 1995 the complainant's second-level supervisor, the Director of the Division of Noncommunicable Diseases (NCD), proposed that she and her first-level supervisor should exchange posts so that her supervisor's could go on the regular budget and her own become extra-budgetary. By circular IC/95/46 the WHO announced a plan to reform the complainant's unit which meant abolishing her post at 1 January 1996. On 2 January she nevertheless got an

offer, on form 80.1, of extension of her appointment by two years. Though the offer referred to post 1.2606, one section of the form contained a suggestion by the Director of the Division for putting her on an extra-budgetary post for one year or two. The Assistant Director-General in charge of the Division gave his approval "until 31.12.97" on the same form, which an officer of the Budget Unit also signed. By a letter of 3 January 1996 to the chief of Contract Administration and Information the complainant accepted the offer but reserved her right to appeal and observed that, failing the notice due under Staff Rule 1040, her contract had by implication been renewed in any event.

By a decision dated 22 February 1996 the Director of the Personnel Division extended her appointment by two years, from 1 January 1996 until 31 December 1997, on an extra-budgetary post with the same number — 1.2606 — as her previous regular budget post. On a form headed "Approval of post description" and dated 27 February 1996 the acting chief of Classification Administration said that the post had become one of "limited duration". On 22 April she appealed against both decisions to the headquarters Board of Appeal.

In its report of 16 November 1996 the Board found evidence of personal prejudice against her and recommended upholding the disputed decisions but safeguarding her "acquired right" to the application of the "reduction-in-force" procedure in case her post was abolished. In a letter of 22 January 1997 the Director-General upheld the two decisions but refused to "offer" her the right to the reduction-in-force exercise. That is the decision she impugns.

B. The complainant contends that the impugned decision is unlawful. In her submission it entails a unilateral change in a fundamental term of her contract since it takes away her right to application of the reduction-in-force procedure. There were no objective grounds for taking her post off the regular budget and putting her supervisor's on it: mere references to "the interests of the Organization" do not suffice. Besides, the Organization had other means of offering her supervisor security of employment. When she applied for post 1.2606 and took up her appointment in 1985 it was one of unlimited duration. It was sheer misuse of authority for the Organization to go back on that so as to deny her the safeguards of the reduction-in-force procedure.

She asks the Tribunal to set aside the impugned decision and award her costs.

C. In its reply the WHO acknowledges that in line with recent rulings by the Tribunal her post is "presently" one of indefinite duration. It denies the charge of misuse of authority and disputes her account of the facts. It submits that the change in the source of funding was a proper exercise of discretion. Owing to budgetary restrictions it no longer had enough funds to finance both the complainant's post and her supervisor's. Because her supervisor's was of greater "programmatic importance" it had to choose between abolishing her post to fund his and using extra-budgetary funds to extend her appointment. In any event it was under no duty to fund a post from any particular budget. Nor was there any proof of personal prejudice, as the decision to extend her appointment by two years bears out.

D. In her rejoinder the complainant rebuts arguments in the reply, enlarges on her earlier pleas and presses her claims. She sees evidence of "favouritism" in the WHO's treatment of her supervisor and in its putting someone with no university education on a post of dental officer at P.4. If the two-year extension she got was, as the WHO says, proof of its goodwill, what was she to make of the three months' notice it served her on 24 January 1997? She says that the Organization put her under "considerable pressure" to consent to the exchange of posts.

E. In its surrejoinder the Organization states that the complainant's post will be abolished after 31 December 1997. But her contract, which then expires, will be extended by three months so that a reduction-in-force procedure can take place. The defendant rejects her accusations of "favouritism" and personal prejudice and maintains that its interests are best served by funding the post more vital to the unit — that of her supervisor — from the regular budget, such funds being available to finance only one post. Its decision to change the funding of the complainant's post was therefore a proper exercise of its discretion and no abuse of its authority.

CONSIDERATIONS

1. As originally filed, this complaint raised two questions relating to decisions by the complainant's employer, the World Health Organization:

(1) to change the source of the funding of the post held by the complainant, No. 1.2606 for a technical officer at grade P.4, from the regular budget to extra-budgetary sources;

(2) to change the duration of the post from indefinite to limited.

2. The second of these questions has now been definitively settled in Judgments Nos. 1624 to 1632, which the Tribunal delivered on 10 July 1997. The WHO now admits that the test identified by the Tribunal in those cases establishes that the complainant's post is of indefinite duration. However, since the question had not been settled prior to the launching of the present proceedings, the complainant asks that the Tribunal at least grant her costs. The Tribunal will return to this question when discussing remedies.

3. The sole remaining question, therefore, is whether the WHO validly decided to move the complainant's post from budgetary to extra-budgetary funding. That decision was communicated to the complainant by a personnel action form which she received on 26 February 1996. The Director of the Division of Noncommunicable Diseases (NCD), who was her second-level supervisor, originally proposed that the change in funding should be effected by her switching posts with her first-level supervisor, Dr. G. Pakhomov, whose own post in Oral Health Services (ORH) had, as a result of reorganization, become extra-budgetary. The reasons for the proposed change are set out in a memorandum that the Director of NCD wrote to the Director of Personnel on 28 September 1995:

> "Dr G. Pakhomov occupies NCD post no 9.0968, which is funded by extra-budgetary sources. Mrs J. Sardo-Infirri occupies NCD post no. 1.2606, which is a regular-budget post. Both of these posts are in the ORH Area (formerly unit) of NCD ...
>
> ORH has been so severely affected by post shifts to comply with budget cuts and restructuring, that it is necessary for programmatic reasons to have a professional dentist as the incumbent of post no. 1.2606. While Mrs Sardo-Infirri, the present incumbent of this post, is very experienced in the work of WHO, and specifically in the ORH programme, she is not a dentist. However, she does have the required background and experience to fill what will be the new duties of post no. 9.0968. Dr Pakhomov is a dentist, and has the required background and experience necessary to fulfil what will be the new duties of post no. 1.2606.

> Accordingly, it is proposed that Dr G. Pakhomov be assigned to post no. 1.2606, and Mrs J. Sardo-Infirri to post no. 9.0968. Their current grade and step will remain unchanged.
>
> It is recognized that this will result in Mrs Sardo-Infirri transferring from a regular budget post to one that is funded by extra-budgetary contributions. Extra-budgetary funds are available to cover the first year of her next contract extension (beginning 1 January 1996), and extra-budgetary funding is guaranteed for this post for the following year. The revised post descriptions will follow.
>
> It is proposed that Mrs. Sardo-Infirri be moved to post no. 9.0968 and Dr G. Pakhomov to post no. 1.2606 immediately, although they will not be officially assigned to these posts until their current appointments expire on 31 December 1995."

4. It is not clear why it was thought necessary to undertake this elaborate stratagem of having the complainant and Dr. Pakhomov "switch" posts but otherwise continue to perform exactly the same duties as before. As matters turned out, it was never given effect and the personnel action form of February 1996, which is at issue in these proceedings, in fact related to the complainant's original post, No. 1.2606.

5. In her appeal to the headquarters Board of Appeal she alleged that undue and improper pressure had been put on her to accept the proposed change. The principal means employed was the threat of unfavourable performance appraisal reports for 1993-94 and 1994-95, which were overdue, and the consequent risk of non-renewal of her contract if she failed to accept renewal on the terms proposed by the Administration.

6. In its report to the Director-General the Board noted the apparent lack of communication between her and her supervisors as well as the fact that the Administration had put her and her first-level supervisor in direct conflict of interest since they were, in effect, competing with each other for regular budget funding. On the question of undue pressure and the improper use of appraisal reports, the Board made strong findings of fact in her favour:

> "The Board noted the delays in completing the appraisal reports and reasoned that they had been used to exert pressure on the Appellant, and that it must therefore be assumed that they were not based on an objective assessment of the Appellant's performance. The Board concluded that this constituted evidence of personal prejudice against the Appellant under Staff Rule 1230.1.1 as well as of incomplete consideration of the facts under Staff Rule 1230.1.2 in the completion of the appraisal reports for the periods October 1993 to September 1994 and October 1994 to September 1995."

7. The Tribunal is satisfied that there was evidence to support these findings. The WHO does not argue that they were wrong or should be overturned.

8. In its conclusions, however, the Board did not give effect to the complainant's attack upon the decision to move her post from budgetary to extra-budgetary funding. It said:

> "In the light of the reduced resources available to the Division and the stated needs of ORH which the Appellant did not dispute, the Board recommended that the decisions taking post no. 1.2606 4 off the Regular Budget and limiting its duration be maintained."

9. In the Tribunal's view the Board erred in law.

10. While the Tribunal will not review the substance of discretionary administrative decisions such as decisions on funding and reorganisation, it does have the power to review the process leading to such decisions and to look into questions such as abuse of authority, incomplete consideration of the facts or failure to respect elementary principles of justice: see Judgment 1131 (*in re* Louis) under 5.

11. It is a fundamental requirement of any decision to abolish a post that there be objective grounds for it: see Judgment 1231 (*in re* Richard) under 26.

12. The same principles apply to a decision to change the source of funding for a position. While such a decision may be less drastic in its immediate consequences than the decision to abolish a post, it nonetheless can have a serious impact upon the job security of the employee and in the long run produce the identical result.

13. While there may well have been, as the Board of Appeal found, perfectly valid reasons to change the source of funding of the complainant's post, the fact that those reasons were infected by extraneous considerations such as personal prejudice, improper pressure, conflict of interest and incomplete consideration of the facts, serves to render the whole decision bad. It is clear to the Tribunal that the decisions to delay the complainant's appraisal reports and then to issue unfavourable reports were inextricably linked to the decision to transfer her post from a funded to an unfunded source and to get her to accept that decision.

14. The Tribunal concludes that the complaint must be accepted and the Director-General's decision endorsing the Board's recommendation for

upholding the decision to take the complainant's post off the regular budget must be set aside.

15. On the question of remedy, however, the Tribunal is not persuaded that this is a case where it would be appropriate to quash the impugned decision. While, for the reasons stated, the decision is unquestionably open to attack, the fact remains that the same decision could and very likely would have been reached even if there had been no grave errors of the type identified. In those circumstances, the quashing of the decision would most likely simply result in the WHO's going back to the beginning and, by following a proper process, coming to the same decision and thus leaving the complainant in no better position than she is in today. Instead the Tribunal believes that the more appropriate remedy both for the complainant and for the WHO would be to order the payment of damages and that the amount of 25,000 Swiss francs would afford proper compensation to the complainant in the circumstances.

16. Even if the complainant had not succeeded on the principal question she would be entitled to some of her costs in respect of the secondary one. As it is, and in view of her success on both questions, the Tribunal will order the payment of her costs in the amount of 5,000 Swiss francs.

DECISION

For the above reasons,

1. The Tribunal declares the complainant's post (No. 1.2606) to be one of indefinite duration.
2. It orders the WHO to pay her 25,000 Swiss francs in damages.
3. It awards her 5,000 Swiss francs in costs.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

Mella Carroll

MELLA CARROLL

MARK FERNANDO

JAMES K. HUGESSEN

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

EIGHTY-FOURTH SESSION

***In re* Wang** **Judgment 1730**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Damei Wang against the Food and Agriculture Organization of the United Nations (FAO) on 31 October 1996, the FAO's reply of 23 January 1997, the complainant's rejoinder of 18 April and the Organization's surrejoinder of 7 July 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Chinese citizen who was born in 1946, was employed by the FAO from 1974 to 1978 at grade G.4 and from 1983 to 1986 at P.3. At the material time she held a fixed-term appointment at P.3 as a translator and reviser starting on 9 July 1991. In between contracts she was in government service in the People's Republic of China.

By a letter of 15 April 1993 the Director of the Personnel Division told her of the outcome of talks with the Chinese Government: Chinese language staff would thenceforth be recruited by the same procedure as any other language staff, including examination, and anyone already under contract would have to pass the examination to qualify for an extension of appointment.

The complainant took the examination on 15 May 1993. By a letter of 21 September the Director of Personnel told her that she had failed but would get an extension, until 30 June 1994, to allow her to try again. She did so on 14 April 1994. In a letter of 19 October the Director of Personnel informed her that she had again failed; the workload of the Chinese translation group was "under review with a view to rationalizing the staffing level"; and she would get one last extension until 31 December 1994.

By a letter of 21 November 1994 she lodged an appeal with the Director-General. In a letter dated 20 December the Assistant Director-General in charge of Administration and Finance rejected it on the Director-General's behalf. By a memorandum of 3 February 1995 she put her case to the Appeals Committee. In its report of 10 January 1996 the Committee unanimously recommended reinstating her. But by a letter of 8 August 1996, to which was appended the Committee's report, the Director-General rejected her appeal. That is the decision she is impugning.

B. The complainant observes that until 1993 the system of recruitment left the choice of Chinese language staff and the length of their appointment to the Chinese Government. That, she says, was in breach of the basic principles of the international civil service. One outcome was that she could never build up a long enough unbroken period of service to qualify for a permanent appointment. Citing Judgment 1249 (*in re* Reznikov), she contends that it is wrong to make her suffer for the Organization's letting the Chinese Government "interfere with" the extension of fixed-term appointments.

It was wrong, too, to make renewal depend on passing the examination. The FAO failed to take proper account of her years of satisfactory service. She pleads discriminatory treatment in that it relieved other Chinese language staff of taking the examination. As the Appeals Committee held, the "testing process" was "anything but transparent".

The real reason why the FAO did not extend her appointment was its desire to retrench staff: the Director of Personnel's letter of 19 October 1994 said as much.

She seeks the quashing of the impugned decision and reinstatement in her former or an equivalent post and payment, with interest, of salary and allowances and social security coverage as from 1 January 1995 until the date of reinstatement. Failing the quashing of the decision, she claims payment of the same sums and of one year's salary and allowances as from the date of delivery of the Tribunal's judgment. She claims moral damages and 5,000 United States dollars in costs.

C. In its reply the FAO submits that the Chinese Government exerted no influence on the decision not to extend her appointment. The precedents she cites are therefore immaterial.

What is material is whether it had the right to make her take an examination before it granted her an extension and whether the examination was properly run. There was, in its view, nothing wrong with having the same procedure for Chinese language staff as for staff proficient in other languages, and priority was given to serving officials. Thanks to help from the Offices of the United Nations in Geneva and New York, the testing was confidential and impartial.

D. In her rejoinder the complainant denies suggesting that the FAO acted on instructions from the Chinese Government. What she maintains is that for years the Organization used to let the Government interfere in decisions on renewal and that precedent laid on it the duty to protect her from any injury attributable to its dropping that practice.

As for the examination, the definition of the "required level" was vague and left the FAO free to act arbitrarily. The system of marking and the minimum mark for passing were not determined beforehand but merely improvised as the need arose. So the procedure did not pass muster. The complainant has doubts about the real reason for refusing her an extension, and the failure to fill her post after she left does nothing to dispel them.

E. In its surrejoinder the FAO contends that because of the long intervals between contracts she was not entitled to a permanent one. Nor did her fixed-term appointment carry any expectation of renewal. The Organization was free to hold an examination if it thought fit.

She is citing Judgment 1249 out of context. That judgment rejected the Organization's contention that, having been appointed in the first place because of government pressure, the complainant was estopped from pleading that non-renewal had been due to similar pressure. The complainant's case is quite different since, as she herself acknowledges, the Organization acted under no outside pressure.

The testing was quite impartial. It was not properly a competitive examination but merely a means of "evaluation" to help in deciding whether to renew the contracts of staff.

CONSIDERATIONS

1. The complainant, a citizen of the People's Republic of China, was first employed on the Organization's staff as a typist and proof reader from September 1974 to April 1978 at grade G.4. She then returned to China.

2. At that time the Organization had arrangements with the Chinese Government whereby it employed for limited periods translators and interpreters made available by the Ministry of Agriculture. On their return to the Ministry they were replaced by other Chinese civil servants, but many came back for further periods of employment.

3. The complainant was employed again by the Organization as a translator and reviser at grade P.3 from 21 September 1983 to 20 December 1986 and from 9 July 1991 at grade P.3 under a fixed-term contract for two years.

4. In November 1992, after discussion with the Government the Organization decided that from then on it would be recruiting Chinese staff in accordance with its own rules and by a process of open competition. Since the Chinese staff then employed had not been chosen by that process and the professional qualifications of some of them might not be up to standard, the FAO decided to require them to sit examinations to test their competence. The translators in the other translation sections had all been so tested. The Chinese language translators on the staff were not, however, required to enter an open competition, they were given priority in that they had only to take tests of competence.

5. On 15 April 1993 the Director of the Personnel Division wrote to the complainant to say that after discussion with representatives of the Government the Organization had decided that "the recruitment of Chinese language staff will henceforth follow established FAO procedures, including a competitive language examination as organized in respect of other language staff". It had further decided, he said, that "all Chinese language staff currently serving in the Organization will also be required to undertake this examination", success in which was "a prerequisite for extension of appointment with the Organization".

6. The complainant took the examination on 15 May 1993. The FAO then extended her appointment to 31 December 1993. The Director of Personnel informed her by a letter dated 21 September 1993 that she had been unsuccessful but would be given another chance to take the examination again the following year, so her appointment was again extended, to 30 June 1994. She took the second examination on 14 April 1994. The Director informed her by a letter of 19 October 1994 that she had "failed to reach the required level"; the workload in Chinese translation was "under review with a view to rationalizing the staffing level"; and her appointment was extended to 31 December 1994, when she would leave.

7. On 21 November 1994 she appealed to the Director-General. The Assistant Director-General in charge of Administration and Finance informed her on 20 December 1994 that the Director-General had rejected her appeal. She went to the Appeals Committee on 3 February 1995. In a report dated 10 January 1996 the Appeals Committee found in her favour. The main grounds for its doing so were lack of clarity in the reasons given for making her take the test; lack of "transparency" in the process and in the "consequences" of testing, breach of the rule against the retroactivity of an administrative decision, and failure to put her on a par with other members of the translation group. The Committee mentioned her seniority and good professional record and recommended reinstating her. By a letter of 8 August 1996, however, the Director-General informed her that he did not accept the Committee's recommendations and set out the reasons why. That is the decision impugned.

8. The complainant argues that the decision not to renew her fixed-term appointment on the grounds of her failure to pass the two tests was flawed because it disregarded essential facts, because clearly mistaken conclusions were drawn from the facts and because there was misuse of authority. In support of those pleas she says that the FAO did not take into account "the disadvantages which she suffered as a result of the Organization's acquiescence to recruitment procedures" whereby renewal of appointment was "at the whim of the Chinese Government". Those procedures cost her the continuity of service which would have entitled her to a continuing appointment, although she is not, she says, claiming one. She contends that it is not because the Organization originally failed to apply normal recruitment procedures that she should later suffer by having to sit an examination. To her mind it disregarded her satisfactory record of service. The manner in which it held the examinations lacked "transparency" and therefore proper safeguards of impartiality and fairness. She says that the reason why she failed both examinations was either that she is someone who underperforms in examinations or that the tests were incorrectly marked. She submits that the results should not prevail over her record of years of satisfactory service and that examinations are not necessarily a reliable method anyway of assessing ability to translate. It was, in her submission, an arbitrary and discriminatory decision to have her and other members of the Chinese language staff take an examination and make passing it a condition of renewal of contract. The chief of the translation group was not required to take it. In any event the Organization's real

reason for not renewing her appointment was its wish to reduce the number of Chinese translators.

9. The Organization submits that the only "basic matter at issue" is whether it was right to require the complainant to pass a language test as a condition for renewing the appointment.

10. The question of renewal is governed by Staff Rule 302.907, which states:

> "A fixed-term appointment shall expire automatically and without prior notice on the expiration date specified in the letter of appointment. ..."

and by Manual paragraph 305.5123, which states:

> "Fixed-term appointments do not carry any expectation of, or imply any right to, extension or conversion to any other type of appointment; such appointments expire according to their terms, without notice or indemnity."

The complainant does not challenge the application of those rules. So what is really at issue is whether the Organization is precluded from relying on the results of the two examinations to the complainant's detriment because she was originally recruited without taking the Organization's language test; alternatively, whether the favourable assessment of her work as a translator and reviser in previous periods of service should override the unfavourable results of the examinations.

11. Her allegations that the testing lacked "transparency" and was neither impartial nor fair do not stand up to scrutiny. All the Professional category staff in the Chinese language group took the same language examination for translators and revisers. Staff in the General Service category too were required to sit tests to prove their competence. It was the chief of the Translation Service who chose the examination material. Each staff member was assigned a number so as to conceal identity from the examiners. The examiners were not FAO staff but two Chinese revisers from the United Nations Office in Geneva. Three out of ten translators failed. The results show that the complainant's marks were poor. Anyone who failed the first time was given a second chance and was then examined by officials from the Chinese translation service of the United Nations in New York. Again, as may be seen from the results the FAO has produced, the complainant got a very poor rating.

12. The conclusion is that the tests were fair and impartial and there is no reason to believe that false results were obtained.

13. Since the Organization did not on recruitment test any of the Chinese translators and revisers who had to take the examination and since other members of the Translation Service were tested, it was neither arbitrary nor discriminatory to ask those who had not been tested on entry to take the examination. The fact that the chief of the Chinese translation group was not required to do so is irrelevant; he had retired by the time the complainant lodged her internal appeal.

14. Like any other organisation in the United Nations system, the FAO has a duty to ensure that its staff attain the highest standards of efficiency and technical competence. The arrangements made with the Chinese Government up to 1992 prevented the Organization from exercising its own discretion about the level of competence of Chinese recruits. The fact that the arrangements have ceased is to be welcomed and any surviving anomalies should be corrected, not perpetuated.

15. The Organization does not argue that the complainant's satisfactory record of service is wrong but maintains that it may not prevail over the results of the two later impartial examinations. The Tribunal accepts that plea: what must prevail is indeed the results of the examinations, which are objective assessments of her ability to meet the requirements of the job and which are later in time. The complainant having been found wanting in ability, the decision not to renew her contract was objectively justified. There was no misuse of authority; no mistaken conclusions were drawn from the facts; and no essential facts were overlooked. Nor did the Chinese Government influence the decision in any way. In that regard the case differs from the ones that the Tribunal allowed in Judgment 431 (*in re* Rosescu), where the Tribunal held that a director-general must not "bow unquestionably to the wishes of a government he consults", and in Judgment 1249 (*in re* Reznikov), in which it held that a director-general might not consider himself to be bound by the attitude of a particular government.

16. The complainant claims to benefit from anomalous arrangements that the FAO used to have with the Chinese Government which would not stand up to scrutiny under the Organization's rules. She contends that the Organization is bound by the recruitment procedures followed at that time. But if the anomaly had never existed she might not have been chosen in the first place. There is nothing discriminatory or unlawful about reforming the procedures. The Organization did make special allowance for the Chinese language staff in that it required them, not to enter an open competition, but

merely to pass a test of proficiency. So it did not disregard the fact that they had prior service.

17. Although the complainant argues that examination is not the best way of evaluating proficiency, it is at least an objective method which can be scrutinised afterwards, as it has been in this case. In any event she did not object to the holding of the examinations.

18. There are no grounds for accepting the complainant's contention that the Organization's real reason for not renewing her contract was its wish to reduce the number of Chinese translators. The Tribunal is satisfied on the evidence that the reason why her contract was not renewed was that in two examinations she had been found wanting in proficiency.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

Mella Carroll

MELLA CARROLL

MARK FERNANDO

JAMES K. HUGESSEN

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
* GENEVA *

EIGHTY-FOURTH SESSION

In re Mussnig (No. 2) **Judgment 1731**
(Application for execution)

THE ADMINISTRATIVE TRIBUNAL,

Considering the application filed by Mrs. Gabriele Mussnig on 9 September 1996 for the execution of Judgment 1376, the reply of 19 February 1997 from the World Health Organization (WHO), the complainant's rejoinder of 23 May and the Organization's surrejoinder of 25 August 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS

1. This is an application for the execution of Judgment 1376, which the Tribunal delivered on 13 July 1994, on Mrs. Mussnig's first complaint. In that complaint she challenged the decision of the WHO not to renew her contract after 30 April 1991.

2. The Tribunal concluded under 20:

> "The damage caused to the complainant's career and reputation is so grave that no form of redress short of reinstatement and the grant of a further contract of employment will suffice.
>
> (1) She must be put in the same position as if her contract had never terminated and be reinstated as from the date of termination and up to the date of this judgment. Her salary, allowances and any other benefits are to be reckoned at the rates applicable at WHO Headquarters in Geneva. The assumption is that since her performance was without reproach it would have continued to be so; she is therefore further entitled to any annual within-grade step increments she would ordinarily have been granted. Any indemnities or occupational earnings she may have received since termination may be deducted from the amounts due,

but she is entitled to payment of interest on all arrears at the rate of 10 per cent a year as from the dates at which they fell due.

(2) She must be granted a contract of employment for a period of two years from the date of this judgment at the appropriate grade and step and in a post matching her qualifications and experience.

(3) She is entitled to an award of damages for the moral injury she has suffered, and the amount is set at 25,000 Swiss francs."

3. The decision of the Tribunal was:

"1. The Director-General's decision [not to renew her contract] is quashed.

2. The Organization shall reinstate the complainant, as provided in 20(1) above, as from the date of termination of her appointment.

3. It shall grant her a contract of employment for two years, as provided in 20(2) above, from the date of this judgment.

4. It shall establish a report appraising her performance from May 1990 to April 1991.

5. It shall pay her 25,000 Swiss francs in moral damages.

6. It shall pay her 6,000 Swiss francs in costs."

4. The complainant acknowledges that the WHO has fully executed points 1, 5 and 6. But she contends that it has –

(a) failed "to do its utmost to successfully reinstate" her; and

(b) refused "to fully reintegrate [her] under a normal fixed-term contract, carrying expectations of renewal", and has instead offered her a fixed-term contract for two years from 13 July 1994 to 12 July 1996 and thus "did not comply either with the substance or the spirit of Judgment 1376"; and

(c) failed to give her a performance appraisal report for the period from May 1990 to April 1991.

Reinstatement

5. The complainant's principal submission is that the WHO, having paid her an advance of 80,000 United States dollars on account of salary, allowances and benefits due from 1 May 1991 to 12 July 1994, failed to pay her the balance, insisting that she should first disclose any occupational earnings she had received during that period so that the amounts could be deducted. She refused on the grounds that the "deduction of earnings from sources outside the WHO is totally unacceptable". She also objects to the WHO's recovering a payment which it had made to her on separation on

account of 41 days' unused annual leave and to its making deductions for health and accident insurance in that period.

6. The Tribunal made the complainant an award of damages for moral injury. The order for reinstatement was distinct, being intended to make good the financial loss which she had suffered. Under that order she was entitled to recover an amount equivalent to all the sums which, had she remained in service, she would have received by way of salary, allowances, within-grade increments and other benefits: no more, no less. If, therefore, she did not account for what she had earned during the relevant period she would recover more than her actual loss. The Tribunal rules that the complainant must disclose all her occupational earnings for that period, and the WHO may deduct those amounts.

7. As for her unused annual leave, payment under that head was due only on separation. Reinstating her meant that she had to be treated as if there had been no separation and, consequently, the WHO was entitled to recover that payment. In fact she suffered no prejudice because the WHO immediately credited her with another 41 days' leave.

8. The WHO conceded that the deductions made for insurance were wrong and it cancelled them in March 1995.

9. The Tribunal holds that the WHO has duly executed its decision in regard to reinstatement, subject only to its paying the balance due to the complainant, which it must pay immediately upon the disclosure and deduction of earnings as set out in 6 above.

The grant of the two-year contract

10. The complainant alleges that the post she previously held, for a technical officer at grade P.3, step 8, was one of indefinite duration. She contends that she should have been given an appropriate post in the same category within one month of the date of delivery of Judgment 1376; what the WHO offered her instead was a post of limited duration at grade P.4, step 2, and that, too, only on 13 December 1994. She admits, however, that the argument as to the duration of her post did not arise in the original proceedings.

11. The WHO replies that what the Tribunal ordered was the grant of a two-year contract on an appropriate post and at an appropriate grade and step: it did not stipulate that the post must be one of indefinite duration. As for the delay, the WHO pleads that there was no suitable vacancy for her in

July 1994 and that it took immediate steps to create and finance a post. It completed the procedural formalities in December 1994 and made a formal offer in that month, retroactive to 13 July 1994. In fact the complainant had already begun to work on 4 October 1994 on the basis of a job description which she admits was drawn up with some input from her. Although she did not accept and sign the contract offered to her, she received the corresponding salary and other benefits.

12. The Tribunal holds that the offer to the complainant of the two-year contract on a post of limited duration was in compliance with Judgment 1376, which did not deal with the question of the duration of the post she was to be put on. Furthermore, the delay in making that offer was not unreasonable in the circumstances.

13. The complainant further argues that the post offered to her was fictitious; "as early as of beginning of February 1995 her job with the corresponding job description (of which she obtained a copy only on 20 December 1994) did not formally exist"; and there was a "sudden and perhaps calculated disappearance of her post". She refers to two memoranda sent by the Director of her unit to the Director of the Personnel Division, one in March and the other in May 1995, requesting her reassignment. Two reasons were given for the request. First, of the funds expected in October 1994 contributions from Germany, Japan and Sweden had been cut in November and December 1994, and funds expected from the World Bank in January 1995 were delayed. Secondly, the staff member who was to be her supervisor had been ill since February 1994, and although in October 1994 it was hoped that he would be back at work by February 1995 he was not, and the lack of supervision made it difficult to employ her efficiently.

14. The Tribunal holds that the post offered to the complainant was not a fictitious one.

15. The complainant makes several other allegations: that the delay in giving her a contract resulted in failure to appraise her performance and consequently she was not given due within-grade increments; and that she did not get an identity card from the Swiss authorities. Those allegations do not relate to the grant of a contract in accordance with Judgment 1376 but to the proper implementation of that contract. They are quite outside the scope of this application for execution of the judgment.

The appraisal of the complainant's performance

16. In order to execute point 4 of the decision in Judgment 1376 the WHO sent the complainant a performance appraisal form for her to complete and return so that it could be forwarded to her first-level supervisor. She protested, quite justifiably, in a letter of 28 November 1994 that the appraisal should not be made by her former supervisor as he had been the cause of the problems which had prompted her first complaint. Despite the Director of Personnel's assurance in a letter dated 9 January 1995 that another staff member would make the appraisal she omitted to complete and return the form.

17. The conclusion is that she may not properly object to the failure to complete her performance appraisal report.

DECISION

For the above reasons,

Subject only to what is said in 9 above, the application is dismissed.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

Mella Carroll

MELLA CARROLL

MARK FERNANDO

JAMES K. HUGESSEN

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

EIGHTY-FOURTH SESSION

***In re* Stjernswärd** **Judgment 1732**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Jan Erik Eyvind Stjernswärd against the World Health Organization (WHO) on 17 January 1997 and corrected on 18 February, the WHO's reply of 21 May, the complainant's rejoinder of 30 June and the Organization's surrejoinder of 29 September 1997;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Swede who was born in 1936, joined the staff of the WHO in 1980 as a "Medical Officer (Chief of Unit)" at grade P.5 in the Cancer Unit, later known as the Cancer and Palliative Care Unit. From 1992 to 1994 he served as chairman of the Staff Committee. He retired on 30 June 1996.

His complaint is about what he describes as "systematic vexation and harassment", which he traces back to the early 1980s, when the Director-General, then Director of the Regional Office for the Western Pacific, began finding fault with his work. In 1990 the Director-General called in a consultant, Dr. H. Danielsson, to conduct a review of the Cancer Unit. After 18 months' study he submitted a report to the Director-General on 22 January 1992. The report praised the Unit for its contributions – particularly its work on the early detection of cervical cancer – and suggested ways of expanding the programme.

By information circular 45 of 25 June 1993 the Director-General announced reform and asked senior officers to review the organisation of their divisions. In June 1994 the chief of the Oral-Health Unit became Associate Director of the Division of Noncommunicable Diseases (NCD), which the Cancer Unit belonged to. The complainant's relations with the new Associate Director soured and they disagreed over duty travel, staffing and other administrative matters. On 24 August 1994 the Associate Director submitted to the Director-General a timetable for reform of NCD. In October 1994 the complainant protested to the Director-General against improper treatment by the Associate Director.

From September to November 1994 another consultant, Dr. S. Fujita, reviewed the cancer programme under instructions from the Director-General. In his report to the Director-General of 11 January 1995 Dr. Fujita dismissed as "scientifically incorrect" and "misleading" the term "downstaging" attributed by the Cancer Unit to a technique which purportedly allowed nurses and other paramedical workers to detect cervical cancer at a stage when the disease was "still curable". He recommended, among other things, doing away with the complainant's unit.

On 21 April 1995 the complainant lodged an internal appeal with the headquarters Board of Appeal alleging discriminatory treatment and breach of the rules on supervision, reassignment and right of association.

By circular 46 of 17 May 1995 the Director-General announced reforms of NCD as from 15 May 1995. The units were replaced with "programme areas" and the title "chief of unit" with "senior professional officer" or "responsible officer".

By a memorandum of 20 June the Associate Director gave the complainant a written reprimand accusing him of "obstructive actions" and "insubordination" such as late submission of documents, a "blatantly deficient response to a specific request", "repeated refusal to comply with requests" and "repeated derisory comments" at staff meetings about the reform and management of the Division.

On 22 June the complainant filed a second appeal objecting to the reforms on much the same grounds as those he had put forward in his first appeal. On 4 September 1995 he lodged a third appeal, against the reprimand.

By a memorandum of 22 January 1996 he protested to the Director of the Division against the removal of three references to him by name from the draft programme of a meeting on cervical cancer which the WHO was holding with the European Research Organization on Genital Infection and Neoplasia (EUROGIN). On 6 February the Director added at the end of the memorandum a handwritten note of apology for what he admitted was "a vexing oversight".

In its report of 31 July 1996 the Board took the view that his first two appeals were not receivable: the first because it could not be taken "in isolation" and the second because general reforms could not be seen as "directed" against any one staff member. As to the third, it recommended withdrawing the reprimand; removing it from his personal record; awarding him 5,000 Swiss francs in costs; and rejecting his claims to reversal of the decision to restructure the Division and to moral damages. By a letter of 18 October 1996 the Director-General decided to withdraw the reprimand and strike it from his personal record; granted him 2,500 francs towards costs; and rejected his other claims. That is the challenged decision.

B. The complainant submits that the WHO treated him unlawfully. He objects to the Board's treating his first two appeals as irreceivable: it had a duty to examine them. He has two main pleas on the merits.

The first is breach of his status and contractual rights in the removal of his title and duties as "chief medical officer". Citing precedent, he observes that loss of responsibility may be as harmful as lowering of grade and a change in title may cause moral injury so grave as to warrant compensation.

Secondly, he pleads "systematic vexation and harassment". Though the Director-General plainly had a long-standing dislike of him, the more bitter for his staff union work, he says the harassment became constant towards the end of his career. The Administration kept him out of important policy decisions and meetings and refused his requests for staff. Dr. Danielsson's review having found no fault with the cancer programme, the Director-General called on Dr. Fujita, who had no experience of the prevention, detection or treatment of cancer in the developing world, to get rid of the complainant's unit. Though the complainant lodged protests against the unfair treatment, the Administration failed to keep its promises to carry out a proper investigation. Tampering with an official document for the EUROGIN meeting was yet another example of wrongdoing that the WHO did not see fit to look into.

He claims moral damages in an amount to be set by the Tribunal and 8,000 Swiss francs in costs, less any sums already paid by the WHO under that head.

C. In its reply the Organization contends that the complaint is devoid of merit. It denies depriving the complainant of his "professional functions" or title. He was its "primary authority" on cancer and palliative care throughout his career in the Organization and had the same title – "medical officer" – from recruitment to retirement. It treated him in the same way as the other chiefs. The reforms were, it submits, in keeping with recommendations from its governing bodies and in its interests. The Associate Director did not harass the complainant, who "refused to cooperate".

D. In his rejoinder the complainant infers from the Organization's silence on receivability that it concedes that the Board's treatment of his first two appeals was mistaken. He enlarges on his pleas and observes that the WHO has not said why it failed to investigate the charges of harassment. Nor has it seen fit to comment on the EUROGIN "incident".

E. In its surrejoinder the defendant presses the arguments in its reply and rebuts the main points in the rejoinder. Although the Board of Appeal rightly regarded his first two appeals as irreceivable it nevertheless took account of the facts and pleas he put forward in them. Instead of confining its comments to the subject of his third appeal the Organization answered the issues he raised in all three. It denies promising a formal investigation into his supervisor's treatment of him and dismisses the EUROGIN incident as a "simple mistake".

CONSIDERATIONS

1. The complainant appeals from a decision of the Director- General of the World Health Organization (WHO) dated 18 October 1996 by which the recommendations of the headquarters Board of Appeal were in part accepted and in part rejected. In its report the Board had recommended that the written reprimand given to the complainant be withdrawn and that he be awarded the sum of 5,000 Swiss francs to cover his legal costs, but that no other redress be considered. The Director-General agreed to the withdrawal of the reprimand but allowed a payment of only 2,500 francs on account of costs.

2. It should be noted that the Board's report examines the substance of three separate appeals by the complainant. Even though it takes the view that the first two appeals were not receivable in isolation, it considers them as part of the background to the third appeal and as support for the complainant's allegation that he was the victim of a campaign of harassment. The Organization having conceded that the Tribunal has jurisdiction to review the Director-General's decision in its entirety, there is no issue of receivability before the Tribunal.

3. The substance of the complainant's claim is that he was the victim of harassment and of a concerted plan to degrade him and to downgrade the importance of the work he did. This was allegedly done through the reorganisation of the division in which he worked, the removal of some of his responsibilities and the restriction of his professional activities. The complainant ascribes this to personal prejudice on the part of the Director-General and his first-level supervisor, the Associate Director of the Division of Noncommunicable Diseases (NCD), Dr. Barmes.

4. In a separate but closely related plea the complainant, who retired from the WHO on 30 June 1996, alleges that he was deprived of his title as chief of the Cancer and Palliative Care Unit (CPL) as a result of the reorganisation and that many of his former functions were assigned to others. He asserts that this, in effect, amounts to reassignment by the Administration.

5. His final plea, again clearly related to the foregoing grounds of complaint, is that from the time that Dr. Barmes became Associate Director of NCD he subjected the complainant to a campaign of "systematic vexation and harassment"; this consisted of a disproportionate emphasis on administrative tasks, serious obstacles to his duty travel, restrictions on conference participation, staffing and workload difficulties, a degrading incident with regard to a meeting the WHO was to hold with the European Research Organization on Genital Infection and Neoplasia (EUROGIN) and, finally, a written reprimand which was placed on his personnel file.

6. Like the Board of Appeal, the Tribunal considers that all three facets of the complaint, being interrelated, need to be considered together. The complainant's plea that the Administration's actions with regard to him were motivated by personal prejudice against him colours and underlies both of the other pleas; if the actions complained of in the second and third parts of the complaint were in fact taken in good faith and for proper motives,

there can be no doubt that they are beyond the scope of the Tribunal's review.

7. Thus, while the Organization admits that some of the duties of the complainant changed over time and in particular as a consequence of the restructuring and reorganisation of NCD, his official title of "medical officer" and his grade and post remained unchanged throughout the relevant period. The former designation of "chief" was replaced throughout NCD with "senior professional officer" or "responsible officer"; in this respect the complainant was treated no differently from anyone else. The removal of direct responsibility for cancer screening and treatment from the complainant can be seen as a perfectly legitimate part of a restructuring in which, in the interests of better organisation and administration, responsibility for those areas was separated from responsibility for palliative care, which remained under the complainant's direction.

8. It is likewise with the allegation regarding harassment. It is clear that the complainant was fiercely opposed to the reorganisation and restructuring of NCD and was determined, no doubt in perfect good faith and in what he conceived to be the best interests of the Organization, to prevent it from taking place. It is also clear that the complainant did not get on with Dr. Barmes and that the appointment of the latter, in June 1994, to be Associate Director (later Director) of NCD sat ill with him. The relations between the two men were tense and conflictual and the atmosphere was not conducive to good communications. The Board of Appeal found that there was fault on both sides in this situation although it attributed the larger share of the responsibility to the Administration for its failure to take action "to prevent or interrupt the development of a conflictual working atmosphere". The Tribunal can find no fault with that finding. In such an atmosphere, it is hardly surprising that the complainant perceived every bureaucratic requirement of him and every restriction on his absolute freedom to run things as he wanted as a personal affront and an attack upon his dignity. It remains, however, that unless the complainant can establish improper motivation the Administration has both the right and the duty to organise itself and to supervise the expenditure of its funds and the movements of its staff in ways which it conceives to be in the best interests of the Organization as a whole. No staff member, even a senior one such as the complainant, has the right to refuse to comply with administrative requirements which are generally applicable throughout the Organization.

9. This leads to the question of personal prejudice. The Tribunal is, of course, conscious of the fact that an allegation of personal prejudice will rarely be susceptible of direct proof and must usually be established by inference: see Judgment 495 (*in re* Olivares Silva) under 14. Where there is a rational and legitimate explanation for a decision, however, the Tribunal should not be overzealous to infer bad faith or improper motive simply because the individuals concerned do not enjoy good personal relations.

10. The complainant's evidence of personal prejudice against him on the part of the Director-General is thin in the extreme. He suggests that his role in the Staff Association, where he served on the Committee and, for a time, as chairman, caused the Director-General to be biased against him. The existence of conflicts and disagreements between the Staff Association and the Administration - surely not an abnormal feature - and an off-hand comment in dubious taste by the Director-General himself are far too flimsy a foundation on which to base such a serious allegation.

11. The same is true of a number of professional disagreements between the complainant and the Director-General going back over the years almost to the time when the complainant first joined the WHO in July 1980. It is possible, and indeed quite normal, to disagree profoundly or even passionately with another person's opinion and to express such disagreement in strong terms without being prejudiced or biased against that person.

12. This brings the Tribunal to what appears to be the real source of the conflict between the complainant and his immediate supervisor, Dr. Barmes, and senior management as a whole. Not only was the complainant, as found by the Board of Appeal, vigorously opposed to the restructuring of NCD and the division of his responsibilities for WHO cancer policies, but he seems also to have been in serious professional disagreement with senior management. This centred on a particular method of early screening for cervical cancer, known as "downstaging", in the development and promotion of which he had been very active. The scope and extent of this disagreement can best be seen in a report commissioned by the Director-General in 1994 and prepared by Dr. Fujita. This report, while extremely complimentary of the complainant's work in the field of palliative care, is scathingly critical of "downstaging", which it describes as "not only scientifically incorrect but also misleading". At another point in the report "downstaging" is described as "a dangerous venture or even a deceit".

13. The Tribunal stresses that it is not competent to assess the merits of the Fujita report or to rule on the rights and wrongs of the professional disagreement which it so clearly highlights. Indeed, the circumstances in which the report was prepared clearly lay it open to criticism on the grounds that the complainant, the head of the unit most intimately concerned, was only minimally consulted by Dr. Fujita. That, however, is quite beside the point. Whether it is correct or deeply flawed, there can be no doubt that the report shows the existence of a profound professional disagreement between the complainant and members of senior management.

14. This disagreement lies at the very heart of virtually all the incidents underlying the complainant's allegations. In particular, restrictions on duty travel and limitations on attendances at conferences where the complainant might be expected to promote "downstaging" are not only rationally explained by such disagreement, but can even be seen as a positive duty on the part of the Administration. It is likewise with the removal of cancer screening and treatment from the complainant's responsibilities and the ultimate transfer of that part of the functions of the Cancer and Palliative Care Unit from Geneva to Lyons.

15. There is a world of difference between personal prejudice against a staff member and a belief, whether mistaken or not, that that member's professional opinion is wrong. Furthermore, where a staff member is as highly placed as was the complainant, so that his views might naturally be taken as those of the Organization, the Administration must have the ability to prevent such staff member from degrading its reputation. While there can be no doubt that the Organization has a duty to respect its staff members' professional dignity and reputation, that duty is limited by the Organization's corresponding right to require staff members not to promote policies or theories which it believes to be wrong or mistaken.

16. In the final analysis, and since neither the Tribunal nor any other body can give a final and binding decision as to who is correct in a professional difference of opinion over policy, the last word must rest with the Administration to determine its own policy.

17. The Tribunal concludes therefore that the complainant has failed to establish that the actions of the Organization were infected by personal prejudice. Since this is the main ground and essential underpinning of the complaint, it follows that the claim for compensation must fail.

18. That is not the end of the matter, however. As indicated earlier, the Board of Appeal found that there had been serious failures in communications and that, while there was blame on both sides, the greater share of it must rest on the shoulders of senior management, whose responsibility it was to prevent conflictual situations from getting out of hand in the way that this one did. The Tribunal agrees with that finding and adds that the Administration was also seriously at fault in not being more open and frank in its dealings with the complainant, particularly with regard to the professional disagreement identified above. While that cannot excuse, it serves to explain the complainant's insubordination. The Board's recommendation that the written reprimand be removed from his file was clearly appropriate and was accepted by the Director-General. In the Tribunal's view the Board was also right in the circumstances to recommend the payment of the complainant's costs in the amount of 5,000 Swiss francs. The Director-General's refusal to accept that recommendation in its entirety is not justified.

19. It follows that the complainant's recourse to the Tribunal for the purposes of claiming the amount recommended by the Board is fully justified. Likewise, his request for a further sum of 3,000 Swiss francs is also well-founded and should be allowed.

DECISION

For the above reasons, the Tribunal:

1. orders the WHO to pay to the complainant the sum of 5,000 Swiss francs, less any sum previously paid, and to pay him 3,000 Swiss francs in costs;
2. dismisses his other claims.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

MICHEL GENTOT

JULIO BARBERIS

JAMES K. HUGESSEN

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

EIGHTY-FOURTH SESSION

***In re* Umar** **Judgment 1733**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Ijaz Umar against the International Atomic Energy Agency (IAEA) on 22 October 1996 and corrected on 19 November 1996, the IAEA's reply of 25 February 1997, the complainant's rejoinder of 26 March and the Agency's surrejoinder of 30 June 1997;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Paragraph 68 of Section 3, Part II, of the IAEA Administrative Manual and paragraph A.2 of a staff notice, SEC/NOT/1309, issued on 31 January 1990 say that applicants for posts subject to geographical distribution must have the sponsorship of the government of their country.

The complainant, a citizen of Pakistan who was born in 1943, joined the staff of the Agency in 1974. At the material time he belonged to the General Service category of staff and was an inspection assistant in the Division of Operations of the Department of Safeguards. On 4 May 1995 he applied for a post as a safeguards inspector at grade P.3. The notice of vacancy said: "appointment is subject to government endorsement".

The Director General having approved the reserve list of applicants for P.3 and P.4 posts, of which the complainant was one, the Deputy Director General of the Department asked the Director of the Division of Personnel in a memorandum of 12 July 1996 to seek the Director General's approval for offering him a post as safeguards inspector.

Having got a letter from the Permanent Mission of Pakistan in Vienna stating that "the Pakistan Atomic Energy Commission [was] not in a position to sponsor Mr. Umar's candidature", the Director of Personnel wrote to the Director General on 15 July to ask his opinion. By a memorandum of 18 July to the Director General the acting Director of Personnel proposed offering appointments to five candidates on the reserve list. They included the complainant. On 22 July the Director General wrote on the memorandum of 15 July that for want of government sponsorship Mr. Umar could not be appointed. On the same day he wrote on the memorandum of 18 July with the following words: "Approved – with the exception of Mr. Umar, who was not sponsored by the govt. of Pakistan". By a letter of 31 July 1996 the head of the Recruitment Unit told the complainant that his application had been unsuccessful, but he did not say why.

By a letter of 11 September 1996 the complainant asked the Director General to reconsider or, failing that, to allow him to go directly to the Tribunal. In a letter of 9 October 1996 – the impugned decision – the Director General refused to review his decision on the grounds that the situation had not changed, but he agreed to waive the internal appeal procedure.

B. The complainant has three pleas. First, he submits that the requirement of government sponsorship infringes Article VII.D of the IAEA Statute, which says that the paramount consideration in recruitment is "to secure employees of the highest standards of efficiency, technical competence, and integrity". Paragraph 68 of the Manual, however, makes government sponsorship the paramount consideration. That, in the complainant's view, has deprived the Agency of the services of many applicants from developing countries.

Secondly, citing the case law, he contends that the Agency is in breach of Article VII.F of its Statute: submitting to a veto from a member State amounts to accepting instructions from it. He asserts that an international civil servant can never be truly independent of a government to which he owes his appointment.

Lastly, to set such a condition on recruitment or on promotion from the General Service to the Professional category offends against the independence of the international civil service.

He asks the Tribunal to declare null and void the rules on government sponsorship in the Manual and in the staff notice of 31 January 1990; to quash the Director General's decision of 9 October 1996; to order the Agency to promote him as from 12 July 1996 to a P.3 post as a nuclear safeguards inspector; and to award him 35,000 Austrian schillings in costs.

C. In its reply the Agency explains that, although at the outset the requirement of government sponsorship was needed for the purpose of recruiting competent staff, it has become a means of obtaining assurance about a candidate's "credentials", and the Agency's terms of reference make that essential.

It submits that government sponsorship is not inconsistent with Articles VII.D and VII.F of the Statute, since it entails consultation only about a candidate that the Agency has already chosen on merit. Besides, the Director General may waive the requirement if he deems fit, even though he did not in this case, and he has the last word on appointment. The requirement does not impair the independence of its staff. Taken together, Articles VII.D and VII.F reflect the Agency's inability to find the staff it needs without help from its member States.

D. In his rejoinder the complainant questions the usefulness of government sponsorship in obtaining information about someone who, like himself, has been in the Agency's employ for twenty-two years. In his submission the process is more than just consultation: it allows a member State to veto an application. That the Director General may waive the requirement does not make it any more lawful. Neither rule expressly mentions waiver or the circumstances in which it may be granted. The complainant believes that someone of his qualifications and seniority was entitled to an explanation from the Director General for his refusal to waive the requirement.

E. In its surrejoinder the Agency presses its pleas.

CONSIDERATIONS

1. The complainant, a citizen of Pakistan, joined the Agency on 16 April 1974 as a safeguards technician at grade G.4. He was promoted to G.5 on 1 November 1974, to G.6 on 1 January 1978 and to G.7 on 1 January 1984. He now holds a post at step 12 in G.6, which is equivalent to step 12 in G.7 under the old system of numbering.

2. On 4 May 1995 he applied for a post at grade P.3 as a safeguards inspector. The notice of vacancy stated that appointment was "subject to government endorsement".

3. On 18 January 1996 the complainant's first-level and second-level supervisors signed a report appraising his performance. The former stated that "Mr. Umar should not only be promoted to the professional level but be also kept in our Section where he is a very valuable asset". The second-level supervisor stated his "full agreement with the comments made by the supervisor".

4. In accordance with the Agency's special procedure for recruiting safeguards inspectors and the recommendations of the Joint Advisory Panel on Professional and G.8 staff the Director of the Division of Personnel sought on 11 June 1996 the Director General's approval for putting the complainant on a reserve list of P.3 safeguards inspectors. The Director of Personnel said that if the complainant's appointment were approved his contract would have to be superseded by a new fixed-term one for three years. The Director General having given his approval, the Deputy Director General of the Department of Safeguards sought the Director General's approval for offering the complainant appointment to a floating post in the Department. By a memorandum dated 15 July to the Director General the Director of Personnel reported that the Permanent Mission of Pakistan had said that the Atomic Energy Commission of that country "was not in a position to sponsor" the complainant's application. He requested advice.

5. By a further memorandum to the Director General of 18 July the acting Director of Personnel asked that offers of appointment be made to the staff on the reserve list of P.3 safeguards inspectors, who included the complainant. The Director General wrote his replies, both dated 22 July, on the two memoranda. On the one of 15 July he stated: "My approval was given on the express condition of government sponsorship. In the absence of that sponsorship Mr. Umar is not appointed." On the memorandum of 18 July he wrote: "Approved – with the exception of Mr. Umar, who was not sponsored by the govt. of Pakistan".

6. The complainant was informed on 31 July that on the basis of the completed evaluation, his application had not been successful. No reason was given.

7. The complainant replied on 11 September that it appeared from the endorsement on the memorandum of 15 July that the sole reason for rejecting his application was the failure to secure government sponsorship. He submitted that sponsorship was contrary to the principles of the international civil service and to Articles VII.D and F of the Agency's Statute. In accordance with Staff Rules 12.01.1(D)(1) he asked for review

of the decision in the letter of 31 July and, if the Director General was not willing to reverse it, for waiver under Rule 12.02.1(B) of the Joint Appeals Board's jurisdiction and for leave to appeal directly to the Tribunal.

8. The Director General confirmed on 9 October 1996 that he had approved the complainant's inclusion in the reserve list of P.3 safeguards inspectors on the express condition of government sponsorship; that such sponsorship had not been given; and that he saw no reason to reverse his decision but agreed to waiver of the Joint Appeals Board's jurisdiction. That is the impugned decision.

9. Article VII.D of the Agency's Statute provides:

> "The paramount consideration in the recruitment and employment of the staff and in the determination of the conditions of service shall be to secure employees of the highest standards of efficiency, technical competence, and integrity. Subject to this consideration, due regard shall be paid to the contributions of members to the Agency and to the importance of recruiting the staff on as wide a geographical basis as possible."

Article VII.F reads in part:

> "In the performance of their duties, the Director General and the staff shall not seek or receive instructions from any source external to the Agency ..."

10. The Agency says that the requirement of government sponsorship has existed for nearly 40 years and has since the beginning applied to all posts that are subject to geographical distribution. In 1990 the Agency had a particular need for qualified technical staff and its Board of Governors called on member States to suggest competent candidates who would ensure the highest standards prescribed by Article VII.D. The Agency explains that the requirement developed throughout the years into a useful instrument for checking a candidate's credentials. It was and still is of paramount importance in view of the Agency's terms of reference. It is also – says the Agency – of practical use in that many staff came and still come from a national civil service or an institution in the "semi-public sector", such as a research or other institute and they go back to their home country with the useful knowledge they have gained in their scientific fields while working for the Agency. Lastly, the Agency points out that according to Article VII.D "due regard shall be paid to the contributions of members ... and to the importance of recruiting the staff on as wide a geographical basis as possible". Since member States are entitled only to a limited number of staff their interest in the employment of their nationals cannot be ignored. "Some sort of consultation with Member States on the appointment of

Agency staff must therefore be held." In practice, once the process of selection is over, the Agency asks the resident representative of a member State whether it will sponsor the chosen candidate.

11. The Agency says that from time to time a member State will refuse sponsorship but that in exceptional circumstances the Director General has waived the requirement when he deemed that necessary in the Agency's interests. That shows, the Agency argues, that the Director General does not seek instructions from a member State but the process is rather one of consultation.

12. In Judgment 431 (*in re* Rosescu) the Tribunal held, in 6:

> "The executive head of an organisation is bound at all times to safeguard its interests and, where necessary, give them priority over others. One area in which the rule applies is staff recruitment. If a director-general intends to appoint to the staff someone who is a government official in a member State he will normally consult the member State, which may wish to keep the official in its service. Similarly, if such a government official's appointment is to be extended, it is reasonable that the organisation should again consult the member State, which may have good reason to re-employ him. This does not mean that a director-general must bow unquestioningly to the wishes of the government he consults. He will be right to accede where sound reasons for opposition are expressed or implied. But he may not forego taking a decision in the organisation's interests for the sole purpose of satisfying a member State. The organisation has an interest in being on good terms with all member States, but that is no valid ground for a director-general to fall in with the wishes of every one of them."

13. The circumstances outlined in that case have no parallel here. The complainant was not being recruited for the first time but had been in the Agency's service for twenty-two years. Pakistan was consulted not about an extension of his contract but about a promotion for which he was fully qualified and it gave no explanation at all for its refusal to "sponsor" him. It did not even say it wished to re-employ him.

14. If Pakistan had given a reason the Director General would have had to consider whether it was sound or not and whether refusing him the appointment was in the Agency's best interests. Since it offered none, he had no basis on which to exercise his discretion. The complainant was fully qualified for promotion; his abilities were well known to the Agency and appreciated. The paramount consideration mentioned in Article VII.D was heeded, namely seeking staff of the highest standards of efficiency, technical competence and integrity. The reason stated by the Agency for refusing him

the appointment which he would otherwise have been granted is therefore untenable and acting from that reason amounted to a mistake in law.

15. The complainant has asked the Tribunal to declare that paragraph 68 of Section 3, Part II, of the Manual and paragraph A.2 of staff notice SEC/NOT/1309 are void because they are contrary to Articles VII.D and VII.F of the Agency's Statute and to the general principles of the international civil service. Paragraph 68 is about appointments in the Professional and higher categories of staff and it reads:

> "68. Appointments to posts subject to geographical distribution require sponsorship by the competent authorities in the applicant's Member State. This will be obtained by the [Director of the Division of Personnel] before an offer of appointment is made to the selected candidate. Such sponsorship is deemed to have been given if the Member State concerned does not inform [that Director] to the contrary within a reasonable period of time after having been approached in writing by the Agency."

Paragraph A.2 of SEC/NOT/1309 says:

> "In the case of posts subject to geographical distribution, due regard shall be paid to the importance of recruiting staff on as wide a geographical basis as possible. Accordingly, government sponsorship will be required."

16. The requirement of government sponsorship in those two provisions is *ultra vires*. The provisions must comply with the requirements of Articles VII.D and F of the Statute. In the performance of their duties the Director General and staff may not seek or receive instructions from any source external to the Agency. For the Director General to allow a member State a veto on the appointment of a staff member is to "receive instructions" from an external source and an interference with the paramount consideration of securing staff of the right calibre.

17. The Tribunal declares that paragraph 68 of the Administrative Manual and the sentence "Accordingly government sponsorship will be required" in paragraph A.2 of SEC/NOT/1309 are null and void as being contrary to Articles VII.D and F of the Statute.

18. The impugned decision is set aside. Since the complainant would have been promoted if the Director General had not allowed the unreasoned veto by the member State, he is entitled to appointment to a grade P.3 post for a nuclear safeguards inspector under a fixed-term contract for three years as from 22 July 1996, the date of approval of the other appointments from the reserve list of P.3 safeguards inspectors.

19. The complainant is also entitled to the sum of 35,000 Austrian schillings in costs.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The complainant is entitled to appointment as from 22 July 1996 to a post for a nuclear safeguards officer at grade P.3 on a fixed-term contract for three years.
3. The Agency shall pay him 35,000 schillings in costs.

In witness of this judgment Miss Mella Carroll, Judge, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

Mella Carroll

MELLA CARROLL

MARK FERNANDO

JAMES K. HUGESSEN

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
GENEVA

Registry's translation,
the French text alone
being authoritative.

EIGHTY-FOURTH SESSION

In re Duval

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Corinne Duval against the European Organisation for the Safety of Air Navigation (Eurocontrol Agency) on 3 July 1997;

Considering that by a letter of 25 September 1997 the complainant informed the President of the Tribunal that she wished to withdraw suit;

Considering that by a letter of 13 October 1997 the Agency informed the Registrar that it had no objection to the withdrawal of suit;

Considering that suit is unreservedly withdrawn;

DECISION

The withdrawal of suit is hereby recorded.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

MICHEL GENTOT JULIO BARBERIS EGLI

A.B. GARDNER

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

EIGHTY-FOURTH SESSION

***In re* Kagermeier (No. 4)**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mrs. Ingrid Maria Kagermeier against the European Patent Organisation (EPO) on 29 March 1996 and the EPO's reply of 14 August 1997;

Considering that by a letter of 21 October 1997 the complainant informed the Registrar of the Tribunal that she wished to withdraw suit;

Considering that by a letter of 4 November 1997 the Organisation informed the Registrar that it had no objection to the withdrawal of suit;

Considering that suit is unreservedly withdrawn;

DECISION

The withdrawal of suit is hereby recorded.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

MICHEL GENTOT

JULIO BARBERIS

EGLI

A.B. Gardner

A.B. GARDNER

INTERNATIONAL LABOUR ORGANISATION
ADMINISTRATIVE TRIBUNAL
* GENEVA *

ISSN 0378-7362

If this address is wrong, please return this sheet to the sender or, at least, the part bearing the address

Pour tout changement d'adresse, prière de renvoyer à l'expéditeur cette feuille ou, du moins, la partie comportant l'adresse

Sírvase indicar el cambio de dirección del destinatario y enviar esta hoja al remitente, o al menos la parte en que está escrita la dirección

INTERNATIONAL LABOUR OFFICE
BUREAU INTERNATIONAL DU TRAVAIL
OFICINA INTERNACIONAL DEL TRABAJO
CH-1211 GENÈVE 22

P. P.
1211 GENÈVE 22